80-2051 NO.

Office-Supreme Court, U.S.
FILED
MAY 30 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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May 28, 1981

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Questions Presented

1. Does a statutory amendment which requires the prior written approval of the Governor of New Jersey and one other designated State official as to resolutions or actions of the New Jersey Highway Authority unconstitutionally violate the obligations of contract between the Authority and its bondholders, where prior to the amendment the Authority had been expressly established by law as an independent entity, not to be limited or restricted by the State in any way?

2. Does a statutory amendment which vests in the Governor of New Jersey the power to veto actions of the New Jersey Highway Authority unconstitutionally violate the obligations of contract between the Authority and its bondholders, where prior to the amendment the Authority had been expressly established by law as an independent entity, not to be limited or restricted by the State in any way?

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NO.

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FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

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NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the Supreme Court of New Jersey entered on March 2, 1981, and sub-

mit this statement to show that substantial Federal questions are presented and that the Supreme Court has jurisdiction of the Appeal.

Opinions Below

The Opinion of the New Jersey Supreme Court is printed in Appendix A* hereto, p. 1a and is reported at 85 N.J. 277, —— A.2d —— (1981). The Opinion of the Court of first instance (New Jersey Superior Court, Chancery Division) is printed in Appendix B hereto, p. 26a and is reported at 164 N.J. Super. 246, 395 A.2d 1280 (Ch. Div. 1978).

Jurisdiction

Appellants initiated this action in October, 1975 in the Superior Court of New Jersey, Chancery Division, to declare unconstitutional an amendment to Section Four of the New Jersey Highway Authority Act, N.J. Stat. Ann §§ 27:12B-1 to -35 (West 1966 & Cum. Supp. 1980-1981), on the ground, *inter alia,* that it violated the Contract Clauses of the Constitutions of the United States and the State of New Jersey.

The Appellants argued that the amendment of N.J. Stat. Ann § 27:12B-4, pursuant to N.J. Laws 1973, c.370, which conferred upon the Governor of New Jersey and either the State Treasurer or the Comptroller of the Treasury the power to control the actions of the New Jersey Highway Authority as to the issuance and refunding of bonds and the establishment of tolls for the use of the Garden State Parkway, as well as authorizing the Governor to

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* Appendices A, B, C and D to this Jurisdictional Statement are bound herein.

review and veto minutes of New Jersey Highway Authority meetings, operated to impair the obligations of contract as to holders of bonds issued under the New Jersey Highway Authority Act in contravention of U.S. Const., Art. I, §10. On November 16, 1978, the New Jersey Superior Court granted summary judgment to plaintiffs and declared the amendment unconstitutional.

On appeal, the New Jersey Supreme Court, in a judgment dated March 2, 1981, reversed, holding that the amendment to N.J. Stat. Ann. §27:12B-4 did not violate the Contract Clause. The Notice of Appeal was filed in that court on April 30, 1981. Appendix D, p. 95a

Jurisdiction of the Supreme Court to hear this Appeal is invoked under U.S.C. §1257(2), this being an appeal from a final judgment of the Supreme Court of New Jersey, the highest court of that State, holding that Chapter 370 of the Laws of New Jersey of 1973 does not violate Article I, Section 10 of the United States Constitution.

Statutory and Constitutional Provisions Involved

New Jersey Highway Authority Act §§ 27:12B-1 to -35 (West 1966 & Cum. Supp. 1980-1981).

Reprinted in relevant part in Appendix C to this jurisdictional statement, p. 73a.

U.S. Const., Art I §10

> "No State shall . . . pass any . . . Laws impairing the obligation of contracts."

Statement of the Case

The New Jersey Highway Authority ("Authority") is a body corporate created in 1952 by the New Jersey Highway Authority Act ("Act") and empowered to acquire, construct, maintain and operate roadways; to fix, revise and collect tolls for transit over roadways constructed by it and to issue bonds or notes for financing of any of its corporate purposes, to be secured by a pledge of all or any part of its tolls or revenues. In specific terms, the Act established the Authority as an independent entity, designed to assure investors in Authority bonds that the Authority possessed the power to secure their investments and to preclude the State of New Jersey from acting unilaterally or arbitrarily to jeopardize their investments.

Evincing the autonomous character of the Authority was the solemn pledge by the State to bondholders under the Act that it would not limit or restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of such bonds or notes authorized by this Act or in any way impair the rights or remedies of the holders of such bonds or notes. . . ." N.J. Stat. Ann. §27:12B-11. In a similar regard, the State also promised that the tolls established by the Authority would not "be subject to supervision or regulation by any other commission, Board or Agency of the State." N.J. Stat. Ann. §27:12B-14. Final indicia of the Authority's independnt status are the bond resolution covenants, authorized by the Act, which declare that the Resolution constitutes a contract between the Authority and the holders of Authority bonds issued pursuant to that Resolution. *See* N.J. Stat. Ann. §27:12B-9.

On January 7, 1973, the Governor of the State of New Jersey signed Chapter 370 of the Laws of 1973, effective immediately, which amended N.J. Stat. Ann. §27:12B-4 to include the follows provisions:

> No resolution or other action of the Authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the Authority without the prior approval in writing of the Governor and at least one of the following: The State Treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.
>
> A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certification of the secretary thereof, to the Govenor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof by the Governor prior thereto. If, in said 10-day period, the Governor returns such copy of the minutes with veto of any action, ex-

> cept action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, taken by the authority or any member thereof at such meeting, such action shall be null and of no effect.

New Jersey Laws 1973, c. 370.

The Appellants, Trustees of Bond Resolutions outstanding prior to the statutory amendment, instituted a declaratory judgment action claiming the addition of the new provisions annulled the Authority's exclusive statutory right to issue and refund bonds and to fix, revise and collect tolls. The Appellants argued that the requirement of unilateral approval by the Governor and either the State Treasurer or the Comptroller of the Treasury of Authority Resolutions operated to impair the preexisting contractual obligations between the bondholders and the Authority and was unconstitutional under the contract clauses of both the United States and New Jersey Constitutions. The Superior Court agreed, and on cross-motions for summary judgment declared the amendment unconstitutional. Appendix B, pp. 71a-72a.

The Supreme Court of New Jersey thereafter granted Appellee's motion to hear a direct appeal from the Superior Court judgment. On March 2, 1981, the New Jersey Supreme Court ruled that the amendment was constitutional under the Contract Clause. Appendix A, pp. 24a-25a.

How the Federal Question was Raised and Decided Below

Appellants in their Complaint asserted that the amendment of N.J. Stat. Ann. §27:12B-4 violated Article I, Section 10 of the United States Constitution which prohibits

the States from passing any law which impairs the obligation of a contract. It was further argued the amendment was arbitrary, capricious, and invidiously discriminatory as to Authority bondholders and therefore constituted a taking of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.*

The Superior Court held that the Amendment substantially impaired "the contract rights of the holders of the bonds of the Authority heretofore issued in violation of the contract clause of both the Constitution of the United States and of the State of New Jersey." (Appendix B, p. 64a). Judgment in favor of the plaintiffs was entered accordingly.

On Appeal, defendants' motion for direct certification to the New Jersey Supreme Court was granted. 82 N.J. 282 (1979). In reversing the Superior Court decision, the Supreme Court held that the statutory amendment did not impair the bondholders' obligation of contract so as to violate either the Federal or State Constitution.

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* Similar assertions were also advanced under the corresponding sections of the New Jersey Constitution.

I

THE FEDERAL QUESTION IS SUBSTANTIAL

There is an urgent need for the Court to enforce the mandates of *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), and to vindicate appellants' rights under the Contract Clause of the United States Constitution.

The decision of the New Jersey Supreme Court is in direct contravention of the Court's decisions in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). The amendment of N.J. Stat. Ann. §27:12B-4 plainly represents an express infringement upon security provisions of the New Jersey Highway Authority Act which formed an integral part of the contract between the bondholders and the State. Unreasonable in scope and unsupportable as a valid exercise of governmental power, the amendment must fall as an unconstitutional impairment of the obligations of contract between the bondholders and the Authority.

The purpose of the Contract Clause is to protect people from the arbitrary actions of state legislatures in altering the legal consequences of pre-existing contracts. *Fletcher* v. *Peck*, 10 U.S. (6. Cranch) 87, 137-38 (1810). Although relegated to the background of constitutional analysis for a period of time,[1] the decisions in *United States Trust* and *Spannaus* signal a renaissance in which the Contract Clause has regained its vitality as a potential limitation on State action. Read together, those decisions

[1] B. Wright, the Contract Clause of The Constitution 258 (1938).

estabish a framework of review against which the constitutionality of state statutes impairing contractual rights must be assessed. Simply stated, that standard is whether the impairment in question was reasonable and necessary.[2] Appellants submit that the amendment at issue in this case worked to impair the contractual rights of Authority bondholders in a manner which was neither reasonable nor necessary to any governmental purpose and so must fall as unconstitutional.

It is not disputed that a contractual relationship exists between the Authority bondholders and the State of New Jersey.[3] It has long been recognized that any legislative interposition which effectively alters the contractual relationship between the parties to that contract constitutes an impairment of the obligations of contract. *Murray* v. *Charleston*, 96 U.S. 432 (1878). Accordingly, it must be determined in this case whether the legislative imposition of control by the executive branch over the previously autonomous Authority unreasonably and substantially impairs the rights of the involved bondholders. Plainly that query must be answered in the affirmative. As originally enacted, the New Jersey Highway Authority Act was replete with assurances by the State of New Jersey that the Authority established to implement the Act would be both fiscally and politically independent.[4] Indeed, express in the Act is the pronouncement that "[t]he State of New Jersey does pledge to and agree with the holders of the bonds or notes issued pursuant to authority contained in this Act, that this State will not limit or re-

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[2] See 438 U.S. at 244; 431 U.S. at 25.

[3] See N.J.Stat. Ann. §27:12B-9; Appendix B at p. 42a.

[4] See N.J. Stat. Ann. §§27:12B-5; -9; -11.

strict the rights hereby vested in the Authority . . ." N.J. Stat. Ann. §27:12B-11. It was with this solemn pledge that the Authority's bonds were offered to the investing public. Similarly, it was upon the representation that the Authority would remain an autonomous entity, free from external control that the bonds were issued and purchased.

The amendment of N.J. Stat. Ann §27:12B-4 giving the Governor of New Jersey and another designated State official the power to effectively control and in fact veto[5] Authority actions as to issuance and refunding of bonds and the regulation of tolls cannot be characterized as anything less than an express repudiation of the original declaration that the Authority would not be subject to restrictions or limitations by the State of New Jersey. Such a situation is directly contrary to the design of the Act as it was held out to investors. No longer is the Authority an independent body free from outside encroachment and exclusively responsible for its own finances. Rather, it is vulnerable to political caprice and unilateral action which may jeopardize the value and security of the bond investments. The alteration of the Authority's power structure is manifest.

In seeking to justify the amendment of N.J. Stat. Ann. 27:12B-4, the State has advanced a variety of notions. One such theory is that the amendment can be supported by the fact that the Governor has the power to appoint members of the Authority and so his inclusion along with

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[5] As noted by the trial court, the statement of the Bill's sponsor which accompanied it to the New Jersey State Assembly candidly declared: "The purpose of his Bill is to give the Governor veto power over certain activities of the New Jersey Highway Authority." Appendix B, p. 41a.

another official represents merely a change in the membership of the Authority. This position, endorsed by the New Jersey Supreme Court,[6] is without merit for it ignores the legislative confirmation necessary for such appointments and wrongfully assumes that Authority members will follow the Governor's direction without regard to their oaths of office. Further, it disregards the basic consideration that the significance of the Authority rests in its independence. The Authority's relationship with the bondholders was grounded upon the State's guarantee that fiscal control would be vested solely in the Authority and unimpaired by State intervention. That guarantee rings hollow in the face of the amendment to N.J. Stat. Ann §27:12B-4.

Another argument raised by the State was that the Governor's ability to adversely effect the bondholders' interest is restricted by mandatory resolution procedures designed to automatically adjust toll charges if necessary to prevent default on the bonds. Again, however, it must be noted that the focus of inquiry should be directed not to the scope of the Governor's actions, but whether he should be permitted to act at all. The intrusion of the State representatives into the affairs of the Authority serves only to increase the potential for conflict at the expense of the bondholders. Acknowledging that potential, the trial court stated that it had "no doubt that any Governor of this State would act in good faith. But individuals of good faith can have reasonable differences of opinion. The time spent in litigation to resolve what is reasonable can be lengthy and time consuming, particularly in respect to projected finances." Appendix B, p. 59a.

In assessing the reasonableness of the contractual impairment in this case, it must be remembered that the tolls charged by the Authority are the exclusive source of fund-

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[6] Appendix A, p. 15a.

ing for bond repayment. Consequently, any limitation on the Authority's power to ensure the collection of sufficient funds to pay the bonds deprives the bondholders of an essential attribute of their contract with the Authority and places their investment in jeopardy. See *Patterson* v. *Carey*, 41 N.Y. 2d. 714, 395 N.Y.S. 2d. 411, 363 N.E. 2d 1146 (1977). Accordingly, it is submitted that the amendment of N.J. Stat. Ann. §27:12B-4 is a direct repudiation of the Legislature's guarantee against State intervention in the affairs of the Authority and constitutes a substantial impairment of the bondholders' financial interests under their contract with the State.

With regard to the reasonableness and necessity of the impairment in this matter, the record fails to disclose any supportive considerations. Absent here is any showing that the amendment was advanced in response to an emergency or was designed to accomodate such an eventuality. Although the State had regulated similar areas, unidentified is any important general social problem which the amendment was intended to remedy. Further, the new requirements imposed are neither temporary nor reasonable with respect to the financial security interests of the bondholders.[7] An examination in light of such factors, as enunciated in *Spannaus*[8] reveals the arbitrary character of the amendment and the absence of any substantial justification or necessity for it.

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[7] Further evincing the unreasonableness of the amendment to the statute is the fact that such action would be unforeseeable to the bondholders in view of the existing covenants in the Act against State limitations or restrictions. See *United States Trust*, 431 U.S. at 31-32; *City of El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965).

[8] 438 U.S. at 247-51; see *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Home Bldg & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934).

Reduced to its basic elements, this case presents a clear example of an unconstitutional impairment of contract. Authority bonds were issued in reliance upon the explicit promise by the State that it would not interfere with the operation and fiscal management of the Authority. With the amendment, the Authority is no longer the independent entity it intended to be and once was. Gone with that independence is the Authority's power to ensure whatever action is necessary to secure the integrity of the bonds outstanding. Under the amendment, the operation of the Authority is susceptible to wide variety of extraneous considerations and pressures. Faced with such prospects, particularly in light of the initial assurances against State involvement, severe impairment to the bondholders financial security interest cannot be denied. Without a showing of justification, reasonableness or necessity, as set forth in *United States Trust* and *Spannaus*, the amendment to N.J. Stat. Ann. §27:12B-4 must fall as unconstitutional.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Supreme Court of New Jersey, or, in the alternative, note probable jurisdiction of the Appeal.

Respectfully submitted,

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ROBERT FISCHER, III,
Counsel for Appellants.

Of Counsel:

KEVIN J. COAKLEY,
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KEVIN R. GARDNER.

May 28, 1981

APPENDIX A

Opinion of the Supreme Court of New Jersey, Dated March 2, 1981

FIDELITY UNION TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW JERSEY, AS TRUSTEE UNDER THE GENERAL BOND RESOLUSION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED, PLAINTIFFS-RESPONDENTS, AND MIDLANTIC NATIONAL BANK, A NATIONAL BANKING ASSOCIATION AS TRUSTEE UNDER THE IMPROVEMENT BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 27, 1971, AS SUPPLEMENTED, PLAINTIFF, v. NEW JERSEY HIGHWAY AUTHORITY, A BODY CORPORATE AND POLITIC CREATED AND EXISTING UNDER AND BY VIRTUE OF CHAPTER 16 OF THE LAWS OF 1952, AS AMENDED AND SUPPLEMENTED, AND JOHN J. DEGNAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS-APPELLANTS.

Argued April 21, 1980—Reargued November 3, 1980.

Decided March 2, 1981.

Stephen Skillman, Assistant Attorney General, argued the cause for appellant J n J. Degnan (*John J. Degnan,*

Attorney General of New Jersey, attorney; *Leonard A. Peduto, Jr.*, Deputy Attorney General, on the briefs).

Arthur D. Grossman argued the cause for appellant New Jersey Highway Authority (*Fox and Fox*, attorneys).

Kevin J. Coakley argued the cause for respondents (*Connell, Foley & Geiser*, attorneys for First National State Bank; *Riker, Danzig, Scherer & Debevoise*, attorneys for Fidelity Union Trust Company; *Kevin J. Coakley* and *Robert Fisher*, of counsel; *Robert J. Kelly*, on the brief).

The opinion of the Court was delivered by

SCHREIBER, J.

We are called upon to consider in this case the impact on holders of New Jersey Highway Authority bonds of an amendment to the New Jersey Highway Authority Act, *N.J.S.A.* 27:12B-1 *et seq.* (Act), which confers upon the Governor and either the state treasurer or the comptroller of the treasury the right in effect to veto toll adjustments, their written approvals being required before tolls may be modified, *L.* 1973, *c.* 370, § 1 (amending *N.J.S.A.* 27:12B-4). The asserted invalidity of the amendment is primarily ascribed to the clauses in the federal and state constitutions, Art. I, § 10, and Art. IV, § VII, par. 3, respectively, prohibiting impairment of the obligation of contracts.[1]

Fidelity Union Trust Company and First National State Bank as trustees under certain bond resolutions of the

[1] Plaintiffs initially contended that the amendment violated the Fourteenth Amendment and Art. I, § I of the state constitution. However, these contentions were not briefed or argued on appeal and apparently have been abandoned.

Appendix A

New Jersey Highway Authority (Authority) brought a declaratory judgment action against the Authority and the Attorney General seeking to invalidate the amendment.[2] Upon cross motions for summary judgment the trial court considered among other things various bond resolutions of the Authority and two affidavits concerning the financial effect of the amendment. It held that the requirement that tolls could not be raised or adjusted without the prior approval impaired the bondholders' contract rights in violation of theContract Clauses of both the federal and state constitutions. 164 *N.J.Super.* 246 (Ch. Div. 1978). The defendants, the Authority and the Attorney General, appealed. Pursuant to *R.* 2:12-1, we granted the Attorney General's motion for direct certification which was joined in by all parties. 82 *N.J.* 282 (1979). We reverse.

The Act created a body corporate known as the New Jersey Highway Authority. *N.J.S.A.* 27:12B-4. Its declared purposes were to construct, operate, maintain and improve "modern express highways embodying every known saftey device including center divisions, ample shoulder width, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads . . . ." *N.J.S.A.* 27:12B-2. The Authority was given specific powers to accomplish these purposes. Included were the power to fix, revise and collect tolls, *N.J.S.A.* 27:12B-5(i), and the authorization to issue bonds and notes to be secured by a pledge of all or any part of its tolls or revenues, *N.J.S.A.* 27:12B-9(a)(i). Furthermore, it was authorized to include a covenant with

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[2] Midlantic National Bank also joined in the suit as Trustee of Parkway Improvement Revenue Bonds, 1971 Series. However, these bonds were satisfied in full while the appeal was pending and the claim was dismissed by stipulation.

respect to the toll rates "to be established and charged" in a contract with the proposed security holders. *N.J.S.A.* 27:12B-9(a)(viii). The State pledged to all future holders of the bonds that it would not limit or restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of bonds or notes . . . or in any way impair the rights or remedies of the holders . . . ." *N.J.S.A.* 27:12B-11. Moreover, the tolls were not to "be subject to supervision or regulation by any other commission, board, bureau or agency of the State." *N.J.S.A.* 27:12B-14. Some of the bonds to be issued, up to $285,000,000 in aggregate principal amount, were entitled to a state guarantee of payment of interest and principal. *L.* 1952, *c.* 17, § 1 (current version at *N.J.S.A.* 27:12B-20).

When first created, the Authority consisted of three members appointed by the Governor with the advice and consent of the Senate. Two members constituted a quorum and the vote of two was necessary for motions or resolutions. *L.* 1952, *c.* 16, § 4 (current version at *N.J.S.A.* 27:12B-4). Subsequently, the membership was increased to five, three being necessary for quorum and action. *L.* 1970, *c.* 28, § 1 (current version at *N.J.S.A.* 27:12B-4). The Act was amended again to provide for seven members, four being necessary for a quorum and action. *N.J.S.A.* 27:12B-4 (as amended by *L.* 1975, *c.* 5, § 1).

The specific highway project which the Authority was directed to undertake was construction of "The Garden State Parkway" from Route 17 in Paramus to Cape May. *N.J.S.A.* 27:12B-20. The Authority issued and sold bonds of various series to finance the cost of that construction.

The road was thereupon built and subsequently extended and enlarged. It has been a successful project. According to the Authority's 1977 Annual Report there were 196,390,000 toll trips in that year. Indeed bond interest and bond service (interest and principal amount due on maturing bonds) were covered 3.496 and 1.317 times, respectively. The standard toll on the Parkway since its inception more than 25 years ago has been 25 cents.

Plaintiffs, as trustees of several Authority bond issues, sought to invalidate the amendment to the Act effective January 4, 1974, a date subsequent to the issuance of the bonds. See *L.* 1973, *c.* 370, § 1 (amending *N.J.S.A.* 27: 12B-4). That amendment reads in pertinent part as follows:

> No resolution or other action of the Authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: the State Treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and

every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.

A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certification of the secretary thereof, to the Governor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof by the Governor prior thereto. If, in said 10-day period, the Governor returns such copy of the minutes with veto of any action, except action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, taken by the authority or any member thereof at such meeting, such action shall be null and of no effect.

It is this change, the requirement that revision of the tolls by the Authority may not be effective without the prior written approval of the Governor and the state treasurer or comptroller of the treasury, that the trustees contend violates the Contract Clauses of the federal and state constitutions.

The terms and conditions of each bond series of which the Fidelity Union Trust Company is trustee are prescribed in a General Bond Resolution adopted by the Authority on July 8, 1953 and in supplemental resolutions

authorizing the particular series.[3] First National State Bank is the truste of Junior Revenue Bonds, issued pursuant to a Junior Bond Resolution and a First Supplemental Junior Bond Resolution adopted on July 7, 1962.[4]

Article I, § 10 of the United States Constitution prohibits a state from passing any "Law impairing the Obligation of Contracts . . . ." The Contract Clause was orig-

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[3] GENERAL BOND RESOLUTION (1953)

Series	*Issue Date*	*Authorized*	*Outstanding 12/31/78*
A. (First Supplemental Bond Resolution)	7/1/53	$150,000,000	$60,216,000
B. (Second Supplemental Bond Resolution)	1/1/54	$135,000,000	$54,980,000
C. (Third Supplemental Bond Resolution)	11/1/54	$ 20,000,000	$ 7,947,000
D. Fourth Supplemental Bond Resolution)	7/1/56	$ 8,000,000	—
E. (Fifth Supplemental Bond Resolution)	7/1/56	$ 17,000,000	—
F. (Sixth Supplemental Bond Resolution)	1/1/64	$ 24,900,000	$10,471,000

Series A and B are unconditionally guaranteed by the State of New Jersey as to punctual payment of principal and interest. See *L.* 1952, *c.* 17 (current version at *N.J.S.A.* 27: 12B-20); *First Supplemental Resolution* Art. III, § 301 (1953); *Second Supplemental Resolution* Art. III, § 301 (1953).

[4] These bonds were designated Series One. The principal amount authorized and issued was $40,000,000, the full amount being outstanding as of December 31, 1978.

inally intended to protect agreements entered into between private parties from state legislative interference. *G. Gunther, Constitutional Law* 604 (9 ed. 1975). As early as 1810, however, judicial interpretation extended the sweep of the clause to include agreements to which the state was a party. *Fletcher* v. *Peck*, 10 *U.S.* (6 Cranch) 87, 3 *L.Ed.* 162 (1810). In the nineteenth century the United States Supreme Court use the Contract Clause more than any other constitutional provision to invalidate state legislation. *B. Schwartz, A Commentary on the Constitution of the United States, Part II: The Rights of Property* 268 (1965). The clause was not without its limitation for there also developed a doctrine of inalienability known as the "reserved powers" doctrine—the concept that a state could not bargain away certain powers, such as the power of eminent domain, *Contributors to the Pensylvania Hospital* v. *City of Philadelphia*, 245 *U.S.* 20, 38 *S.Ct.* 35, 62 *L.Ed.* 124 (1917), and the police power so that contracts could "not estop the legislature from enacting laws intended for the public good." *Manigault* v. *Springs*, 199 *U.S.* 473, 480, 26 *S.Ct.* 127, 130, 50 *L.Ed.* 274, 278 (1905); *Stone* v. *Mississippi*, 101 *U.S.* 814, 25 *L.Ed.* 1079 (1880). After 1890 the Court emphasized the Fourteenth Amendment restriction proscribing states from depriving a person of property without due process and from taking property without just compensation and the Contract Clause fell into general disuse. *Schwartz, supra* at 306. However, two recent Supreme Court decisions, *United States Trust Co.* v. *New Jersey*, 431 *U.S.* 1, 97 *S.Ct.* 1050, 52 *L.Ed.*2d 92 (1977), and *Allied Structural Steel Co* v. *Spannaus*, 438 *U.S.* 234, 98 *S.Ct.* 2716, 57 *L.Ed.*2d 727 (1978), have revived the use of the clause in determing validity of a state's economic legislation.

Appendix A

In *United States Trust,* the Port Authority of New York and New Jersey had issued bonds which contained a statutory covenant restricting the extent to which revenues could be applied to deficits created by mass transit operations. New York and New Jersey later repealed the covenant. Justice Blackmun, writing on behalf of a majority of four, held that the repeal violated the Contract Clause. After finding the statutory covenant had been integrated in the contract between the Authority and the bondholders, he concluded that "[a]s a security provision, the covenant was not superfluous; limited the Port Authority's deficits and thus protected the general reserve fund from depletion." 431 *U.S.* at 19, 97 *S.Ct.* at 1516, 52 *L.Ed.*2d at 108. This same factual conclusion had been reached by the trial court which had stated:

> To the extent that the repeal of the covenant authorizes the Authority to assume greater deficits for such purposes, it permits a diminution of the pledged revenues and reserves and may be said to constitute an impairment of the states' contract with the bondholders. [134 *N.J.Super.* at 183]

[1] Having found that the repeal of the covenant impaired a contractual financial obligation, Justice Blackmun questioned whether that impairment violated the Contract Clause. He noted that states have broad police powers which may affect private contracts so long as their statutes exercising those police powers serve a legitimate public purpose and the adjustment of the private parties' duties and obligations is on reasonable terms and conditions. When a state's contract is involved, the initial inquiry is whether the state had the power to create an irrevocable contract right in the first place, since a state cannot sur-

render "an essential attribute of its sovereignty." But, in this respect, a state's authority to enter into financial obligations could not be questioned. *Id.* at 22-24, 97 *S.Ct.* at 1517-1519, 52 *L.Ed.*2d at 109-111.

[2] The next step in the analysis is whether the impairment is reasonable and necessary to serve an important public purpose. Necessity is met if the objectives could not have been achieved by a less drastic alternative. Reasonableness depends upon the extent of the impairment and upon whether the circumstances giving rise to the impairment were foreseeable when the contract was made. *Id.* at 29-31, 97 *S.Ct.* at 1251-1522, 52 *L.Ed.*2d at 114-115.

Chief Justice Burger, concurring, emphasized that "the State must demonstrate that the impairment was essential to the achievement of an important state purpose." *Id.* at 32, 97 *S.Ct.* at 1523, 67 *L.Ed.*2d at 116. Moreover, he argued the state would have to show it was unaware of the state interest at the time the covenant was made. *Ibid.*

Any doubts concerning the strength of the majority opinion which may have existed because of the number of justices participating and the division in the Court were dispelled in *Allied Structural Steel Co.* v. *Spannaus*, 438 *U.S.* 234, 98 *S.Ct.* 2716, 57 *L.Ed.*2d 272 (1978).[5] *Allied Steel* involved a pension agreement between a company and its employees. Minnesota enacted a statute which subjected each employer, having a pension plan and at least 100 employees, to a pension obligation if it closed its Minnesota operations, to those employees who had been

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[5] Justices Stewart and Powell, who had not participated in *United States Trust*, joined in the majority, with Justice Blackmun abstaining.

employed at least 10 years. Allied shut down its Minnesota facilities leaving at least nine employees who had ten years service with no vested pension rights. The state of Minnesota notified the company that a pension funding charge of approximately $185,000 was required to satisfy the entitlement of those employees.

Justice Stewart, writing for the majority, began his analysis by inquiring whether "the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 244, 98 *S.Ct.* at 2722, 57 *L.Ed.*2d at 736. He explained:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. [*Id.* at 245, 98 *S.Ct.* at 2722-2723, 57 *L.Ed.*2d at 736-737]

Finding that the modification of the pension plan was substantial because of the added financial burden, he held that the statute did not embrace a broad social interest, did not operate in an area which had been subject to state regulation when the pension plan became effective, and did not simply cause a temporary alteration of contractual relationhips. He declared the law unconstitution. *Id.* at 245-251, 97 *S.Ct.* at 2723-2725, 57 *L.Ed.*2d at 737-740.

[3] In summary, then, the *United States Trust* and *Allied Steel* cases suggest the following analyses for our pur-

poses:[6] (1) What were the terms of a financial agreement betwen the parties? (2) was there an impairment of a financial condition of the contract? (3) If so, was it substantial? (4) Since the contract was with the State, did the State have the ability to limit its power to act in the future with respect to the administration of the New Jersey Highway Authority Act?

I.

Analysis of the instant case must begin with identification of the terms of the agreement between the Authority and the bondholders. Provisions in the bond resolutions and the Act are the constituent elements of the contract with the bondholders. *N.J.S.A.* 27:12B-9(a).[7] Though administration of the Act was entrusted to the Authority's members when the bonds were issued, bond purchasers knew that the Authority as it existed might

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[6] Commentators have suggested varied interpretations of these cases. See *e. g.*, Hurst, "Municipal Bonds and the Contract Clause: Looking Beyond *United States Trust Company* v. *New Jersey*," 5 *Hastings Const.L.Q.* 25 (1978); Note, "State Adjustment of Private Employer's Obligations under Pension Plan Violates Contract Clause—*Allied Structural Steel Co.* v. *Spannaus*, 9 *Seton Hall L.Rev.* 784 (1978); Note, "Revival of the Contract Clause: *Allied Structural Steel Co.* v. *Spannaus* and *United States Trust Co.* v. *New Jersey*," 65 *Va.L.Rev.* 377 (1979); Note, "A Process-Oriented Approach to the Contract Clause," 89 *Yale L.J.* 1623 (1980).

[7] *N.J.S.A.* 27:12B-9(a) states that the resolution authorizing the issuance of bonds "shall constitute a contract with the holders thereof."

not remain the same throughout the life of the bonds. The Authority's composition, size or even existence were not frozen. "Authority" had been defined in the statute to include

> the board, body or commission succeeding to the principal functions thereof or to whom the powers given by this act to the Authority shall be given by law. [*N.J.S.A.* 27:12B-3(a)]

The statutory definition was substantially incorporated in the General Bond Resolution defining "Authority" to include the board, body or commission succeeding to its functions "or [those] to whom the powers given by the Act to the Authority shall be given by law." *General Bond Resolution* (*GBR*) Art. I, § 102(7). The Junior Bond Resolution incorporated this definition by reference to the General Bond Resolution. *Junior Bond Resolution* (*JBR*) Art. I § 102. Furthermore, whenever the Authority was named or referred to in the General Bond Resolution it was "deemed to include its successors and assigns whether so expressed or not." *GBR* Art. I, § 105. None of the supplemental bond resolutions modified these provisions.

The bondholders could harbor no reasonable expectation that the existence of the Authority or its composition was immutable. Plaintiffs conceded during oral argument that the legislative changes made in the number of Authority members were within the contractual terms. As previously observed, their number went from three to five to seven, and with each increase the number needed to adopt any proposal, including toll adjustments, increased as well. Of course, it was understood that the members,

whose terms were five years,[8] would change throughout the life of the bonds. Furthermore, the Legislature could properly as an administrative matter have eliminated the Authority and transferred its functions to another agency or department of government.

In the absence of some other state constitutional limitation, none of which is involved herein,[9] the Legislature could lawfully have abolished the Authority and transferred all its powers and obligations to a board consisting of the Governor and state treasurer. Such a change would be within the contemplation of the express provisions of the Act and the bond resolutions. No modification in the terms and conditions of the bonds is involved and the obligation to establish and collect such tolls as may be necessary to produce sufficient revenues to fulfill the terms of agreements with the bondholders remains unimpaired. *N.J.S.A.* 27:12B-11. In the final analysis all that has occurred here is an alteration in the structure of the governance of the Garden State Parkway. The further inclusion of the Governor in the administrative process is but an extension of his relationship to the Authority membership, for not only does the Governor nominate its mem-

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[8] Originally terms were nine years. *L.* 1952, *c.* 16, § 4 (current version at *N.J.S.A.* 27:12B-4).

[9] The creation of authorities which are authorized to borrow funds to carry out specified projects avoids the constitutional restriction on the amount of state debt. *N.J.Const.* (1974), Art. VIII, § II, par. 3; *New Jersey Turnpike Authority* v. *Parsons*, 3 *N.J.* 235 (1949). It is not here contended, nor has it been demonstrated, that the structural change involved herein offends the constitutional debt limitations clause or the fiscal independence of the Authority.

bers, but he also designates the chairman and vice-chairman who serve in those positions at his pleasure. *N.J.S.A.* 27:12B-4.[10] The purchasers of the bonds could not have been under any mistaken belief that the Authority's powers and duties could not have been transferred to others within the governmental framework.

[4, 5] Plaintiffs contend that the statutory provision that the tolls "shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State," *N.J.S.A.* 27:12B-14, is violated by authorizing the Governor and another state official to veto a modification in the tolls. Literally read, this might be so. However, that provision must be interpreted *in pari materia* with provisions authorizing a transfer of the Authority's functions to others and granting the Governor authority to nominate the Authority's members and to designate the chairman and vice-chairman. Therefore the language should not be given that broad interpretation derived from a literal reading. Rather, we construe *N.J.S.A.* 27:12B-14 to relate to affirmatively supervising and regulating the collection and application of the tolls. This section does not refer to either the political structure of the governing entity or the watchdog capacity given to the Governor to safeguard the interest of the public and bondholders. In this latter respect it must be remembered that the amendment grants only a veto power. We conclude that the statutory amendment did not violate the terms of the agreement between the Authority and the bondholders.

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[10] It is noteworthy that under the Act the Authority could only receive and accept from any federal agency grants for acquisition or construction of projects subject to the Governor's approval. *N.J.S.A.* 27:12B-5(r).

Appendix A

II.

Unlike the legislation invalidated in *United States Trust* and *Allied Steel*, the amendment here did not involve a substantial financial condition of the agreement. Here the financial security of the bondholders is guaranteed by requiring that the tolls be fixed and adjusted to satisfy the terms and provisions of the contract with the bondholders. *N.J.S.A.* 27:12B-14. The bond resolutions[11] required that the Authority set tolls and charges so that the total net revenue in each calendar year equaled at least 120% of the aggregate bond service for the calendar year. *GBR* Art. I, § 711; *JBR* Art. I, § 711. In the event revenues were insufficient to pay interest on all the bonds and the principal amount of those due, the bonds would not be in default. Instead the Authority had to file with the trustee before May 1 of the next calendar year an engineer's certificate setting forth a schedule of tolls or other charges designed to increase the revenues so that the 120% requirement would be satisfied. *GBR* Art. I, § 1001; *JBR* Art. I, § 101. The engineer had to be independent and satisfactory to the trustee. *GBR* Art. I, § 102(20); *JBR* Art. I, § 103(16).

The General Bond Resolution provided that all revenues from tolls and fees were to be deposited in a Revenue Fund from which the Authority would pay its operating expenses and maintain its working capital. Excess funds would then be placed to the extent needed in the Bond Service Fund, Bond Reserve Fund, Construction Fund, General Fund

[11] All the terms and conditions referred to hereinafter with respect to the General and Junior Bond Resolutions are the same as those applicable to the supplemental resolutions.

and Bond Redemption Fund in that order. The Bond Service Fund contained those sums needed to pay the interest on and principal of the bonds maturing in a period of time fixed by the terms of the particular bond series. The prinicpal amount of those bonds which were maturing was to be transferred to the Bond Redemption Fund shortly before the due dates. The Bond Reserve Fund was set up to hold monies which might be needed if there were a deficiency in the Bond Service Fund. The General Fund was used as a backup for the other funds. *GBR* Art. V, §§ 502-508. The Junior Bond Resolution established a similar scheme. *JBR* Art. V, §§ 501-509.

None of these requirements for the financial security of the bondholders was diminished by the 1973 amendment. Though procedurally the Governor and the state treasurer or comptroller of the treasury were called upon to approve toll adjustments, these officers could exercise that power only

> with due regard for the rights of the holders of bonds, of the authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof. [*N.J.S.A.* 27:12B-4]

[6] Thus it is incumbent on the Governor and the state treasurer or comptroller to comply with the identical toll adjustment provisions of the bond resolution. They

have precisely the same obligations as the Authority members to protect the bondholders' rights. At most there has been a change in the identity of the individuals charged with assuring that the interest of the bondholders and the public in toll adjustments is safeguarded. There has been no substantive alteration in the terms of the bonds. Thus if the revenues do not meet the 120% test, the tolls *must* be adjusted substantially to those prescribed by the engineer's certificate irrespective of the identity of those in charge.

[7] There is considerable authority for the proposition that the Legislature may substitute the officers who administer a project without contravening the Contract Clause. In *State ex rel. Warner* v. *Hoagland,* 51 *N.J.L.* 62 (Sup.Ct.1888), the Legisture abolished a street and sewer commission for the City of New Brunswick, replacing it with the local governing body. The commission had issued improvement bonds, secured by assessments, to finance construction. In finding no impairment of the rights of holders of street and sewer commission bonds in the transfer of its responsibilities to the governing body, Justice Depue held:

> Creditors holding bonds issued by the commissioners have no security for payment beyond the credit of the city and the pledge of assessments. These bonds are obligations of the city, and are enforceable against the city, notwithstanding the repeal of the law under which they were issued; and assessments pledged for their payment may be made available at the instance of creditors, notwithstanding a change in the official body having the collection of them. A change in the mode in which creditors' rights are to be enforced, which does not affect

> any substantial right, is no infringement of the constitutional rights of creditors. *Munday* v. *Rahway,* 43 *N.J.L.* 388 (Sup.Ct.1881), 44 *N.J.L.* 395 E. & A. 1882); *United R. & Canal Cos.* v. *Weldon,* 47 *N.J.L.* 59 (Sup.Ct. 1885). Nor are the respondents constituted the guardians of the rights of the city's creditors. They cannot, as representatives of the city's creditors, protect their official existence from the power of the state to abolish their office. [51 *N.J.L.* at 73-74]

In *Rorick* v. *Board of Commissioners,* 57 *F.*2d 1048 (N.D.Fla. 1932), vacated on jurisdictional grounds, 307 *U.S.* 208, 59 *S.Ct.* 808, 83 *L.Ed.* 1242 (1939), the state of Florida had established the Everglades Drainage District for the purpose of reclaiming swamp lands. The governor and four other state officials were initially charged within management of the administrative and fiscal affairs of the district. During their tenure, bonds were sold to finance the construction of a system of canals, dykes, drains and levees. Payment of interest and repayment of principal were obtained from special taxes assessed on all district land. Thereafter, the Florida legislature changed the membership of the governing board from the state officers to five civilian landowners. Holders of the district's bonds filed suit, contending that the amendment had impaired the obligation of their debt contracts with the district by replacing the original state officers on the board of commissioners. The court rejected the plaintiffs' argument, observing:

> The provisions of the 1931 act, changing the personnel of the board of commissioners to five civilians in lieu of five state officers as originally provided,

> impairs no vested contract right of plaintiffs. The district remains, with officers empowered to perform all its duties toward bondholders. Neither the resources nor the remedy for the payment of plaintiffs' bonds are affected within the purview of the contract clause of the Constitution. *A mere change in personnel of a public board or body is not usually regarded as an impairment of contract obligations.* [57 *F.*2d at 1063 (emphasis supplied)]

To the same effect, see *Reppel* v. *Board of Liquidation,* 11 *F.Supp.* 799, 804 (E.D.La. 1935); *Hall* v. *Underwood,* 258 *Ala.* 392, 402-405, 63 *So.*2d 683, 692-694 (Sup.Ct. 1953); *California Highway Commission* v. *Ballard,* 77 *Cal.App.* 404, 247 *P.* 527, 531 (3 Dis.Ct.App.1926); *Opinion of the Justices,* 246 *A.*2d 90, 95-96 (Del.Sup.Ct. 1968); *Jackson* v. *Consolidated Government,* 225 *So.*2d 497, 504-505 (Fla. Sup.Ct.1969); *People ex rel. Housing Authority* v. *Hursey,* 7 *Ill.*2d 537, 543, 131 *N.E.*2d 483, 486 (Sup.Ct. 1956); *State ex rel. Porterie* v. *Walmsley,* 183 *La.* 139, 178, 162 *So.* 826, 838-840 (Sup.Ct. 1935), appeal dismissed, 296 *U.S.* 540, 56 *S.Ct.* 141, 80 *L.Ed.* 384 (1935); *Board of Education* v. *Dixson,* 202 *Okla.* 110, 111, 210 *P.*2d 669, 670 (Sup.Ct.1949).

[8] Which department, agency or officer is charged with the administration and execution of the New Jersey Highway Authority Act is an organizational decision that does not touch upon the financial obligation owed the bondholders. Here the plaintiffs' assertion that only the Authority may carry out the functions delegated to it fails to recognize that the Authority is the instrumentality to which the project was entrusted. *Behnke* v. *New Jersey Highway Authority,* 13 *N.J.* 14, 29 (1953). That delega-

tion is not directly related to the financial integrity of the bonds. Who will execute the terms of the agreement is an administrative matter. It is a governmental function reserved to the State and not a financial condition of the agreement.[12]

III.

[9] We are also satisfied that even if the statutory amendment be deemed a modification of the bondholders' agreement, it is at most substantial. Both *United States Trust* and *Allied Steel* agreed that not every impairment violates the Contract Clause. The impairment must be substantial. Plaintiffs have not demonstrated any adverse fiancial impact upon their bonds. The only affidavits submitted with the motions stated that the amendment had no effect on the market value of the bonds. The financial

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[12] Plaintiffs contend that the amendment contravenes the State's pledge and agreement pursuant to *N.J.S.A.* 27:12B-11 not to limit or restrict the rights vested in the Authority to maintain any project or to establish and collect tolls or charges convenient or necessary to meet maintenance and operating expenses and fulfill the terms of agreements with the bondholders. This contention misses the point, for the obligation to fix the rate schedule and satisfy all the terms of the agreement remains unimpaired. *Cf. New Jersey Highway Authority* v. *Sills*, 109 *N.J.Super.* 424 (Ch.Div. 1970), supp. 111 *N.J.Super.* 313 (Ch.Div.1970), aff'd *p.c.o.b.* 58 *N.J.* 432 (1971), where statute permitting National Guard personnel and reserves in the armed forces to use the Parkway without fee was held unconstitutional, being in direct conflict with the statutory provision proscribing any vehicle from using the Parkway without paying the prescribed tolls, *N.J.S.A.* 27:12B-18(a). The Attorney General conceded its invalidity under the Contract Clause.

security for the bondholders is the establishment of a rate and application of the revenues consistent with the requisite standards. These criteria remain unimpaired.

The trustees contend that delay in the adjustment of the tolls will create a regulatory lag that will impair the bondholders' security. We perceive no merit in that contention. The written approval of the Governor and the state treasurer must be given within a reasonable period of time. If the effectiveness of the Authority's action depends upon submission of the minutes to the Governor, he would have to act within ten days. In the event of a failure to act within the ten day period, the proposed action would become effective. The slight delay in the approval of a new rate schedule cannot realistically be considered a substantial impairment, particularly when the Governor is bound by the timetable in the bond resolutions, including the filing of the engineer's certificate with a toll schedule before May 1, so that the bondholders will be unaffected.

Plaintiffs and the trial court relied heavily on *Patterson* v. *Carey*, 41 *N.Y.*2d 714, 363 *N.E.*2d 1146, 395 *N.Y.S.*2d 411 (Ct. App. 1977). There the New York legislature rescinded an increase in a parkway toll set by the Parkway Authority and amended the statutory procedure for future increases by imposing a new four stage review process. The Court of Appeals declared the amendatory act invalid on three grounds, the due process clause of the state constitution, improper interference with the state comptroller's discretionary power to supervise financial accounts of public authorities, and the Contract Clause of the federal constitution. In its rationale concerning the Contract Clause, the court asserted that the "[b]ondholders were guaranteed that the authority would have the necessary power to raise tolls in order to pay authority obliga-

tions." 41 *N.Y.*2d at 721, 363 *N.E.*2d at 1152, 395 *N.Y.S.* 2d at 417E. It found an "infringement upon the right to set a proper toll invaded the contractual rights of . . . Authority bondholders." *Id.* at 722, 363 *N.E.*2d at 1153, 395 *N.Y.S.*2d at 417. Unlike the New Jersey statute the intermediaries in the review process were not bound by the same criteria as the Authority. Thus the integrity of the financial conditions, unimpaired under the New Jersey statute, was not assured under the New York law. Moreover, we do not find its reasoning persuasive for we perceive the contractual rights of the bondholders to a proper toll remain unimpaired under the administrative amendment of the New Jersey statute.

IV.

[10, 11] Even if the bondholders' contract did not expressly contemplate a modification or abolition of the Authority, the change would be valid for we have serious doubts whether the State may lawfully bargain away its right to modify the structure of government. The Contract Clause was not intended to disable the Legislature from altering the political structure of government. In *United States Trust,* Justice Blackmun recognized that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." 431 *U.S.* at 23, 97 *S.Ct.* at 1518, 52 *L.Ed.*2d at 110. One such power involves governmental organization. It has been said that "[w]hen the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important." T. Cooley, *Constitutional Limitations*

276 (3d ed. 1874). Chief Justice Marshall wrote in *Dartmouth College* v. *Woodward,* 17 *U.S.* (4 Wheat.) 518, 4 *L.Ed.* 629 (1819):

> [T]he framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and . . . the instrument they have given us is not to be so construed . . . . [*Id.* at 629, 4 *L.Ed.* at 657]

[12, 13] The Contract Clause has never been construed or applied as an obstacle to the exercise of the state's authority to change the structure governing a public entity. In *Shapleigh* v. *San Angelo,* 167 *U.S.* 646, 17 *S.Ct.* 957, 42 *L.Ed.* 310 (1897), the Supreme Court stated:

> The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. [167 *U.S. at* 654, 17 *S.Ct.* at 959, 42 *L.Ed.* at 313]

Thus a contractual relationship between a private party and a governmental entity is not affected when the political structure of the entity changes for governmental rights, rather than property rights, are directly and substantially implicated. See Schultz, "The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations," 36 *Mich.L.Rev.* 385, 407 (1938).

Appendix A

V.

N.J.Const. (1947), Art. IV, § VII, par. 3, provides that the "Legislature shall not pass any . . . law impairing the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made." The last clause regarding remdies was added at the 1844 Convention in response to United States Supreme Court decisions which had distinguished between impairment of an obligation and impairment of its remedy. *Rader* v. *Southeasterly Road District,* 36 *N.J.L.* 273, 276-278 (Sup.Ct. 1873). However, despite the dissimilarity in language, this Court has recognized that the provisions of the federal and state constitutions provide "parallel guarantees." *P.T. & L. Construction Co.* v. *Commissioner,* 60 *N.J.* 308, 313 (1972). In the context of this case, where remedies are not at issue, there is no need to draw a distinction between the two provisions.[13] Accordingly, for all the reasons stated justifying validity under the federal Contract Clause, we find no violation of the state constitution.

Reversed.

For reversal—Chief Justice WILENTZ and Justices SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER, HANDLER and POLLOCK—7.

For affirmance—None.

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[13] When measuring legislation against the state constitution, we have adhered to the principle that "every possible presumption favors the validity of an act of the Legislature." *New Jersey Sports & Exposition Authority* v. *McCrane,* 61 *N.J.* 1, 8, 292 A.2d 545 (1972). Neither *United States Trust* nor *Allied Steel* referred to this principle.

APPENDIX B

Opinion of the New Jersey Superior Court, Chancery Division, Dated November 16, 1978

FIDELITY UNION TRUST COMPANY, A BANKING CORPORATION OF THE STATE OF NEW JERSEY, AS TRUSTEE UNDER THE GENERAL BOND RESOLUSION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED: FIRST NATIONAL STATE BANK OF NEW JERSEY, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED; MIDLANTIC NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, AS TRUSTEE UNDER THE IMPROVEMENT BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 27, 1971, AS SUPPLEMENTED, PLAINTIFFS, v. NEW JERSEY HIGHWAY AUTHORITY, A BODY CORPORATE AND POLITIC CREATED AND EXISTING UNDER AND BY VIRTUE OF CHAPTER 16 OF THE LAWS OF 1952, AS AMENDED AND SUPPLEMENTED, AND JOHN J. DEGNAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, DEFENDANTS.

Superior Court of New Jersey

Chancery Division

Decided November 16, 1978.

Appendix B

Mr. Kevin J. Coakley for plaintiff First National State Bank (*Messre. McElroy, Connell, Foley & Geiser,* attorneys).

Mr. Robert Fischer for plaintiff Fidelity Union Trust Company (*Messrs. Riker, Danzig, Scherer & Debevoise,* attorneys).

Mr. Robert P. Hazlehurst, Jr., for plaintiff Midlantic National Bank (*Messrs. Pitney, Hardin & Kipp,* attorneys).

Mr. Arthur D. Grossman for defendant New Jersey Highway Authority (*Messrs. Fox* and *Fox,* attorneys; *Mr. Fred L. Schwanwede* on the brief).

Mr. John J. Degnan, Attorney General of New Jersey (*Mr. Leonard A. Peduto, Jr.* on the brief).

DWYER, J. S. C. By cross-motions for summary judgment the parties to this declaratory judgment action seek to have determined whether *L.* 1973, *c.* 370 (*N. J. S. A.* 27:12B-4), prohibiting the issuance of bonds or adjusting of tolls without the prior written consent of the Governor and one other designated official and providing that the Governor shall have veto power over the minutes of the meetings of the New Jersey Highway Authority, is unconstitutional in respect to the holders of bonds issued before the effective date of such statute. It is contended that this statute violates Art. I, §10 of the Constitution of the United States of America prohibiting any state from passing any law which impairs the obligations of a contract, and Art. IV, § 7, par. 3, of the Constitution of New Jersey prohibiting the Legislature from passing any law impairing the obligation of any contract. It is further argued that the statute vio-

lates the provisions of the Constitutions of the United States of America and New Jersey, respectively prohibiting the taking of property without due process of law in that said law is arbitrary, capricious, unreasonable, invidiously discriminatory and oppressive if applied to the holders of the aforesaid bonds. Plaintiff's urge the affirmative. Defendants urge the negative.

Pending the decision in *United States Trust Co.* v. *New Jersey*, 431 *U. S.* 1, 97 *S. Ct.* 1505, 52 *L. Ed.* 2d 92 (1977), this action was stayed at the request of all parties. Subsequent thereto they updated certain data, then made the motions for summary judgment with a stipulation that any damage claims would be submitted after the resolution of the questions now before the court.

Plaintiffs are three banks appointed trustees (trustees) under resolutions authorizing the issuance of bonds for the construction or improvement of the Garden State Parkway by the New Jersey Highway Authority (Authority). Defendants are the Authority and the Attorney General of the State of New Jersey (Attorney General). Listed below are the dates the resolutions appointing trustees and setting forth the conditions for issuance of, and security for, the bonds were adopted, and the amount of bonds outstanding as of December 31, 1977:

1 July 8, 1953 resolution appointed Fidelity Union Trust Co. as trustee.

Series	*Issue Date*	*Amount 12/31/77*
A*	7/1/53	$68,970,000
B*	1/1/54	62,888,000

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Series	*Issue Date*	*Amount 12/31/77*
C	11/1/54	9,118,000
D**	7/1/56	—
E**	7/1/56	—
F	1/1/64	11,984,000

(As to asterisks see footnote 1.)[1]

2. July 7, 1962 resolution appointed Midatlantic National Bank as trustee. Junior Bond Resolution.

One	7/1/62	$40,000,000

3. July 27, 1971 resolution appointed First National State Bank as trustee Improvement Bonds.

1971	7/1/71	$80,000,000

Authority was established as a body corporate and politic by *L.* 1952, *c.* 16. See *N. J. S. A.* 27:12B-1 *et seq.* Said law empowered Authority to issue negotiable bonds and notes and to provide covenants for security to the purchasers of bonds. The sections relevant to provisions for

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[1]* Series A and B are guaranteed by the State of New Jersey as to punctual payment of principal and interest on principal amount not exceeding $285,000,000 when same is due. *L.* 1952, *c.* 17. Means for payment are provided in § 5 of said act. The New Jersey Supreme Court held that act valid. *Behnke* v. *New Jersey Highway Auth.*, 13 *N. J.* 14 (1953):

** Retired by issuance of Series F bonds.

security are found in *N. J. S. A.* 27:12B-5, 8, 9, 11, 14 and 18. In summary form they provide:

(a) *N. J. S. A.* 27:12B-5(i) of the act provides that the Authority shall have the power "To fix and revise from time to time and charge and collect tolls or other charges for transit over or use of any project acquired or constructed by it."

(b) *N. J. S. A.* 27:12B-5(j) of the Act provides that the Authority shall have the power "To establish and enforce rules and regulations for the use of any project."

(c) *N. J. S. A.* 27:12B-8(b) of the act provides that "[e]xcept as may be otherwise expressly provided by the Authority, every issue of bonds or notes shall be general obligations payable out of any moneys or revenues of the Authority, subject only to any agreements with the holders of particular bonds or notes pledging any particular moneys or revenues."

(d) *N. J. S. A.* 27:12B-9 of the act sets forth provisions which the Authority may include in any resolution authorizing bonds or notes. It provides that the resolution authorizing the issuance of bonds or notes "shall constitute a contract with the holders thereof." (paretheses deleted). The provisions which may be included in any such resolution are:

(1) "to pledge all or any part of the Authority's tolls or revenues" (§9(a)(i));

(2) "to covenant as to the rates of toll and other charges to be established and charged, the amount to be raised each year or other period of time by

tolls or other revenues, and as to the use and disposition to be made thereof" (§ 9(a)(viii)), and (3) "[to covenant] to do or refrain from doing such acts and things as may be necessary or convenient or desirable in order to better secure the bonds or notes or which, in the absolute discretion of the Authority, will tend to make the bonds or notes more marketable" (§ 9a()(xiv)).

(e) *N. J. S. A.* 27:12B-9(c) further provides that bonds or notes of the Authority may be issued "without obtaining the consent of any department, division, commission, board, bureau or agency of the State, and without any other proceeding or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this act."

(f) *N. J. S. A.* 27:12B-14 of the act provides:

"The Authority is hereby authorized to fix, revise, charge and collect tolls and charges for the use of each project and the different parts of sections thereof, * * *. Such tolls and charges shall be so fixed and adjusted as to effectuate the purposes of this act and in any event to carry out and perform the terms and provisions of any contract with or for the benefit of holders of bonds or notes. *Such tolls and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State.* The use and disposition of tolls, charges and revenues shall be subject to the provisions of any resolution authorizing the issuance of such bonds or notes." (Emphasis supplied).

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> (g) *N. J. S. A.* 27:12B-18(a) of the act specifies that "[no] vehicle shall be permitted to make use of any project except upon the payment of such tolls as may from time to time be prescribed by the Authority.

In *N. J. S. A.* 27:12B-11 the State in 1952 gave its solemn pledge to bondholders that it would not infringe, in the future, on the powers vested in the Authority:

> The State of New Jersey does pledge to and agree with the holders of the bonds or notes issued pursuant to authority contained in this act, that the State will not limit or restrict the rights hereby vested in the Authority to maintain, acquire, construct, reconstruct and operate any project as defined in this act or to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operaton thereof and to fulfill the terms of any agreements made with the holders of such bonds or note authorized by this Act or in any way impair the rights or remedies of the holders of such bonds or notes until the bonds or notes, together with interest thereon, are fully paid and discharged.

Pursuant to *N. J. S. A.* 27:12B-9(c), in connection with each bond resolution, Authority has included provisions for distributing revenues received into various funds to provide for the operation and maintenance of the Parkway, adjusting tolls to assure adequate revenues to meet expenses of operation and maintenance of the Parkway as well as costs of current and projected debt service.

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In summary, the mechanics of the receipt and disbursements of Authority revenues with respect to the bonds is as follows:

1. The first fund established by the bond resolution is the revenue fund in which all revenues are placed. Operating expenses are paid from this fund. The remainder is poured over into other funds.

2. The first fund into which the revenue funds pours over is the bond service fund which is used to meet the Authority's annual bond service requirements.

3. The next fund supplied is the bond reserve fund. This fund must contain a reserve sufficent to pay 18 months of bond service.

4. Revenues are then poured over into the general fund which may be used for future needs of bond service and bond reserve funds and to finance construction projects.

5. Finally, there is the bond redemption fund. This fund (20% of general fund after payments to the bond service and reserve funds) is used to retire some outstanding bonds.

Throughout its entire history the Authority has consistently met all its obligations under the bond resolution.

Section 711 of each of the bond resolutions set forth the conditions under which the tolls must be adjusted. Authority refers to § 711 as the 1.2 provision because it alleges the § 711 requires toll revenue less expenses and working capital to exceed 120% of debt service. In the event Authority fails to adjust tolls when the conditions for raising them arise, the language of the remedy the respective trustees may pursue differs.

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Section 711 of Parkway revenue bond resolution adopted July 27, 1971 provides:

> 711. *Tolls and Charges.* 1. The Authority shall at all times fix, charge and collect such tolls and other charges for transit over or use of the Parkway System as shall be required in order that in each year Net Revenues, shall at least equal 1.20 times the sum of the Aggregate Debt Service and the Prior Lien Bond Service for such calendar year computed as of the beginning of such calendar year, and as shall be required in any event to pay or discharge all charges and liens whatsoever payable out of Revenues
>
> 2. On or before October 1 in each year the Authority shall complete a review of its financial condition for the purpose of estimating whether Net Revenues will be sufficient to meet the requirement therefor specified in subsection 1 of this Section and shall by resolution make a determination with respect thereto. A copy of such resolution, certified by an Authorized Officer of the Authority, together with a certificate of such Authorized Officer setting forth a reasonably detailed statement of the actual and estimated Revenues, Operating Expenses, Prior Lien Bond Service, if any, Aggregate Debt Service, and other pertinent information for such year upon which such determination was made, shall be filed with the Trustee on or before October 20. If the Authority determines that Net Revenues may not be sufficient to meet the requirement therefor specified in subsection 1 of this Section, it shall

forthwith cause the Traffic Consultants to make a study for the purpose of recommending a schedule of tolls for the Parkway System which in the opinion of the Traffic Consultants, will cause sufficient Revenues to be collected in the following calendar year to provide the Net Revenues to meet the requirement therefor specified in subsection 1 of this Section for such following year and will cause Revenues to be collected in such following and later calendar years sufficient to restore the amount of such deficiency in Net Revenues at the earliest practicable time. If, in any calendar year, the Revenues collected shall not have been sufficient to provide the Net Revenues to meet the requirement specified in said subsection 1, the Authority shall (a) unless it has already obtained a traffic study and recommendation in compliance with the immediately preceding sentence, forthwith cause the Traffic Consultants to make a study for the purpose stated in such sentence, and (b) as promptly as practicable and in any case no later than the next April 1, establish and place in effect a schedule of tolls as recommended by the Traffic Consultants. In connection with any traffic study by the Traffic Consultants pursuant to this subsection there shall be prepared, filed with the Trustee and furnished to the Traffic Consultants a certificate of an Authorized Officer of the Authority setting forth the amount of Revenues required to provide the amount of Net Revenues necessary in order to meet the requirement therefor specified in subsection 1 of this Section (including any deficiency from the prior year). Such certificate shall include, for the year

with respect to which such study is to be made, estimates of (i) the amount of Operating Expenses (including provision for working capital and reserves therefor) based on a certificate to this effect by the Consulting Engineers which shall accompany such statement, (ii) 1.20 times the sum of the Aggregate Debt Service and the Prior Lien Bond Service with respect to such year, and (iii) such other pertinent information for such year as shall be deemed necessary to make such traffic study.

3. The Authority shall not reduce any rate of toll for transit over or use of the Parkway System, unless, after giving effect to such toll reduction, estimated Net Revenues for the current and each future calendar year shall be not less than 1.30 times the sum of Maximum Annual Debt Service with respect to all Series of Bonds and the Maximum Annual Prior Lien Bond Service. Such determination shall be based on certificates conforming, to the extent applicable, to the requirements of paragraphs (3), (4) and (6) of subsection 2 of Section 204 which shall be filed with the Trustee.

4. The Authority shall forthwith upon the adoption of any schedule of tolls or revision thereof file certified copies thereof with the Trustee.

5. The failure in any calendar year to comply with the covenant in subsection 1 of this Section shall not constitute an Event of Default under the Resolution, if the Authority shall comply with subsection 2 of this Section; provided that if the Traffic Consultants (relying upon the certificate of the Authorized Officer of the Authority required by sub-

section 2 of this Section) shall be of the opinion, as shown by their certificate filed with the Trustee, that a schedule of tolls for the Parkway System which would provide Net Revenues to meet the requirements specified in subsection 1 of this Section is impracticable at that time, and the Authority therefore cannot comply with subsection 2 of this Section, then the Authority shall fix and establish such schedule of tolls as is recommended by the Traffic Consultants to comply as nearly as practicable with the covenant in subsection 1 of this Section, as evidenced in a certificate filed with the Trustee, and in such event the failure of the Authority to comply with subsection 1 and subsection 2 of this Section shall not constitute an Event of Default under the provisions of the Resolution. The Trustee may and, upon the request of the Holders of not less than 10% in principal amount of the Bonds Outstanding and upon being indemnified to its satisfaction, shall institute and prosecute in a court of competent jurisdiction an appropriate action to compel the Authority to revise the schedule of tolls and fix, charge and collect tolls in accordance with the Act and with any one or more of the covenants contained in this Section.

The court selected the latest resolution because it necessarily had to provide for debt service on the earlier bonds and expressly treated the problem of what the trustee might do if the Authority failed to act under § 711 within the text of § 711. In the 1953 and 1962 resolutions the trustee's remedy upon the failure of the Authority to ad-

just tolls under the comparable § 711 provisions is dealt with under Article X, "Remedies."

Under § 1002 of the 1953 and 1963 resolutions, as well as of the 1971 resolution, the respective trustees, upon stated conditions and upon an event of default, have authority:

> * * * to protect and enforce its rights and any rights * * * [of the trustee] and, to the full extent that the holders of such * * * [bonds] * * * themselves might do, the rights of such holders of * * * [bonds] * * * under the laws of the State of New Jersey or under the * * * [appropriate resolution] * * *, by such suits, actions or proceedings in equity or at law, either for the specific performance of any covenant or contract contained herein or in aid or execution of any power herein granted or for any proper legal or equitable remedy as the * * * [trustee] * * * shall deem most effectual to protect and enforce the rights aforesaid.

Each of the bonds issued under the 1953 resolution is guaranteed by the State of New Jersey and bears a guarantee in the form set forth in § 321 of that resolution which states:

> Each Guaranteed Bond may bear thereon an expression of the guaranty by the State of the punctual payment of the principal of and interest on such Guaranteed Bond, substantially in the following form duly executed by the signature of the State Treasurer of the State or of a person in the Department of the Treasury of the State appointed by him for that purpose:

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Guaranty of the State of New Jersey

> The punctual payment of the principal of and interest on the above bond of the New Jersey Highway Authority has been and is unconditionally guaranteed by the State of New Jersey, and the State is unconditionally liable for the payment, when due, of the principal and interest on said bond. * * *" [Signature legend omitted]

As relevant to the issues in this matter, *L.* 1973, *c.* 370 amended by *N. J. S. A.* 27:12B-4, effective January 7, 1974, by adding the following paragraphs thereto:

> No resolution or other action of the authority providing for the issuance of bonds, refunding of bonds or other obligations or for the fixing, revising, or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: the State Treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligations or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.

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A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certificate of the secretary thereof, to the Governor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof [given] by the Governor prior thereto. If, in said 10-day period, the Governor returns such copy of the minutes with veto of any action * * * taken by the authority or any member thereof at such meeting, such action shall be null and of no effect.

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The sponsor's statement to the bill in the Assembly, and the Senate Committee's statement to the bill in the Senate, are set forth below.[2]

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[2] A. *Senate Statement*

This bill provides that no resolution or other action by the New Jersey Highway Authority for the issuance or refund of bonds or other obligations or for the fixing, revising or adjusting of tolls shall be adopted without prior approval of the Governor and either the State Treasurer or the Comptroller of the Treasury.

The bill further provides that the Governor may veto any action taken by the authority, except action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, for 10 days after a copy of the minutes of a meeting of the authority have been delivered to the Governor.

(Footnote continued on following page)

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(Footnote continued from preceding page)

B. *Sponsor's Statement*

The purpose of this bill is to give the Governor veto power over certain activities of the New Jersey Highway Authority. It would require that the minutes of the meeting of the authority be transmitted to the Governor. If he disapproved of action of the authority, he would then have 10 days (Saturdays, Sundays and holidays excepted) to return the minutes with his objection, if he so chose. If approved by the Governor prior to end of the 10 days the minutes would have force and effect when so approved.

The Governor already has this power over the activities of the New Jersey Turnpike Authority, the Delaware River Port Authority and the New York Port Authority, each of which is as important if not more important than the Highway Authority. There is no rational basis for continuing this inconsistency that now exists in our law.

The New Jersey Highway Authority, whose primary function is to operate the Garden State Parkway but of late has also included additional projects like the construction of the Garden State Art Center, is approximately a ½-billion dollar operation. The Garden State Parkway traverses 144 miles on its north-south route along the coast of New Jersey and is the main link between our fast-growing shore areas and the heavily populated northeastern section of the State and the country. The importance of the projects under the jurisdiction of the State agency to the people of this State cannot be overstated. Its continued operation and development in a manner so as to serve the best interests of the State of New Jersey and its citizens is of the highest priority and therefore, to insure such operation and development, it must have its activities scrutinized by the only State officer elected by all the people of this State, the Governor.

Such scrutiny would in no way impede the activities of the authority nor would it in any way affect the interests of the investors in the authority. It would however result in a greater degree of coordination between the development of authority projects and the needs of the people of this State.

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[1] There is no dispute that the statutes, the resolutions adopted by the Authority thereunder, and the outstanding bonds issued pursuant thereto are contracts. *U. S. Trust Co.* v. *New Jersey, supra; N. J. Sports & Exposition Auth.* v. *McCrane,* 61 *N. J.* 1, 28 (1972); *N. J. Highway Auth.* v. *Sills,* 109 *N. J. Super.* 424 (Ch. Div. 1970), supplemented 111 *N. J. Super.* 313 (Ch. Div. 1970), aff'd o.b. 58 *N. J.* 432 (1971).

Plaintiffs essentially urge that *L.* 1973, *c.* 370, gives to the Governor and another officer in the Executive Department of the State the power to veto the acts of Authority without any standard and thereby violates covenants given to the bondholders, such as are set forth above, and particularly *N. J. S. A.* 27:12B-9(a)(iii); *N. J. S. A.* 27:12B-14 and *N. J. S. A.* 27:12B-11.

The trustees contend that the provisions in the first paragraph of *L.* 1973, *c.* 370, quoted above, give the Governor and one other the equivalent of a power of veto over tolls and hence violate the coveants for security and their right to a remedy in case tolls are inadequate.

Plaintiffs concede that under the police power of the State, the State might be able to enact laws that would affect the rights of the holders of the bonds if such laws were necessary for the public good and were reasonable under the circumstances. They contend, however, that the subject law was not necessary for the public good and is unreasonable under the circumstances.

The Attorney General, in respect to the veto power, urges that

> • • • the true security is to be found in the toll rate itself and the standards by which it is struck.

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> The veto power invested in the Governor by virtue of Chapter 370 of the Laws of 1973 does not touch this security in any fashion.

The Attorney General then urges that the effect of *L.* 1973, *c.* 370 is to change the persons who shall make decisions and that such a change does not violate constitutional guarantees where the means of payment remains intact. In this case he urges that § 711 of the various resolutions provide for the means of payment and the subject law does not affect that section. Therefore he concludes there has been no impairment of contract.

Authority urges that the trustees have failed to show that any purchaser of the bonds relied upon the covenants as to the independence of the Authority in purchasing their bonds; that any purchaser of the bonds has suffered loss due to the enactment of the subject legislation, or that § 711 rights will be interfered with in any manner, and hence the trustees have failed to show how their rights protected by the respective Constitutions have been violated.

The court will consider the following questions in the order stated below.

1. What is the test to determine whether a contract has been impaired?

2. Can the subject law be construed so that it does not impair any contract right?

3. If some portion of the statute does impair the contract rights of holders of existing bonds, is the remainder necessarily invalid?

4. Have the trustees made a sufficient showing to be entitled to judgment?

Appendix B

I.

The United States Supreme Court recently considered the test for violation of the Contract Clause in *Allied Structural Steel Co* v. *Spannaus*, —— *U. S.* ——, 98 *S. Ct.* 2716, 57 *L. Ed.* 2d 727 (1978). Justice Stewart wrote the opinion for a majority of five Justices. The majority held invalid a Minnesota statute that required an employer with 100 or more employees who closed an office or plant in Minnesota to immediately purchase deferred aunnities payable at age 65 for each employee terminated who had at least ten years service with such employer, including service prior to the effective date of the statute. Allied Steel had a pension plan which was qualified under § 401 of the Internal Revenue Code but which did not provide for vesting of rights in a manner to meet the standards of the Minnesota statute; hence, to close its office in Minnesota it would have had to spend $185,000 in the year the statute became effective.

Justice Stewart said:

> There can be no question of the impact of the Minnesota Private Pension Benefits Protection Act upon the company's contractual relationships with its employees. The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake. But it does not inexorably follow that the Act, as applied to the company, violates the Contract Clause of the Constitution.
>
> The language of the Contract Clause appears unambiguously absolute: "No State shall . . . pass

any . . . Law impairing the Obligation of Contracts," U. S. Const., Art. I, § 10. The Clause is not, however, the draconian provision that its words might seem to imply. As the Court has recognized, "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *W. B. Worthen Co.* v. *Thomas,* 292 *U. S.* 426, 433, 54 *S. Ct.* 816, 818, 78 *L. Ed.* 1344.

Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history. Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter. And its basic contours are brought into focus by several of this Court's 20th century decisions.

First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may there-

by be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault* v. *Springs*, 199 *U. S.* 473, 480, 26 *S. Ct.* 127, 130, 50 *L. Ed.* 274. [—— *U. S.* at ——, 98 *S. Ct.* at 2720-2721, 57 *L. Ed.* 2d at 733-734]

He continued:

If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The existence and nature of those limits were clearly indicated in a series of cases in this Court arising from the efforts of the States to deal with the unprecedented emergencies brought on by the severe economic depression of the early 1930's.[3]

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[3] Cases analyzed were *Home B. & L. Ass'n* v. *Blaisdell*, 290 *U. S.* 398, 54 *S. Ct.* 231, 78 *L. Ed.* 413 (1934) (statute authorizing events, during a defined emergency period with a terminal date, to extend period for foreclosure and redemption of mortgages on conditions providing for mortgager to pay rental value to cover taxes, insurance and interest on debt, was valid as to preexisting mortgages); *W. B. Worth n Co.* v. *Thomas*, 292 *U. S.* 426, 54 *S. Ct.* 816, 78 *L. Ed.* 1344 (1935) (statute authorizing in effect a delay in mortgage foreclosure proceedings for up to six years without any payments by mortgagor to mortgagee and

(Footnote continued on following page)

He further stated:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding

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reducing incentives for prompt payment, and which statute had no termination date, was invalid as to preexisting contracts); *Treigle* v. *Acme Homestead Ass'n*, 297 *U. S.* 189, 56 *S. Ct.* 408, 80 *L. Ed.* 575 (1936) (statute modifying law requiring directors of savings and loan associations to devote 50% of accounts collected to a fund to retire shares of withdrawing members outstanding for more than 60 days, to allow directors to use such funds to meet current expenses, payments on current shares or to retire shares of withdrawing members, was invalid as to holders of preexisting shares). He concluded by an analysis of *United States Trust Co.* v. *New Jersey*, 431 *U. S.* 1, 97 *S. Ct.* 1505, 52 *L. Ed.* 2d 92 (1977), and pointed out that where a state attempted to modify its own contracts the court would examine the case "stringently." —— *U. S.* at ——, 98 *S. Ct.* at 2721-2722, 57 *L. Ed.* 2d 734-736.

> under the law, and the parties are entitled to rely on them. [—— *U. S.* at ——, 98 *S. Ct.* at 2723, 57 *L. Ed.* 2d at 736-737]

Justice Stewart concluded that the aforesaid statute retroactively changed the company's contracts with its employees for vesting of pension rights in a substantial manner. There was no period of adjustment but immediate payment of $185,000 was required. There was no showing of any immediate general social problem to be met. The statute did not apply to all employers but only to those who employed 100 or more and also had established a pension plan.

Finally, he said:

> It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent and immediate change in those relationships—irrevocably and retroactively. *Cf. United States Trust Co.* v. *New Jersey,* 431 *U. S.* at 22, 97 *S. Ct.* at 1517 [—— *U. S.* at ——, 98 *S. Ct.* at 2726, 57 L. Ed. 2d at 740]

[2] Impairment may occur if either a right based upon a covenant is destroyed, *Van Hoffman* v. *City of Quincy,* 71 *U. S.* 535, 18 *L. Ed.* 403. (1867) (Illinois repealing statute imposing a tax to pay for bonds and limiting the amount of taxes to be levied held invalid), or if a remedy is modified or altered to such an extent that the underlying right is meaningless for practical purposes. See the cases referred to in footnote 3.

In *United States Trust Co.* v. *New Jersey, supra,* a majority of four Justices of the seven participating held that

a statute adopted both in New York and in New Jersey which repealed an earlier statute prohibiting the Port Authority of New York and New Jersey from engaging in mass rail transit projects if a projected deficit would exceed one-tenth of the general reserve fund or 1% of the Port Authority's total bonded debt violated the Contract Clause.

> • • • As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the State's contract. See *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 *U. S.* 124, 128-129, 57 *S. Ct.* 338, 81 *L. Ed.* 552 (1937). [431 *U. S.* at 19, 97 *S. Ct.* at 1516]

The law under the New Jersey Constitution is comparable. In *Baldwin* v. *Flagg*, 43 *N. J. L.* 495 (Sup. Ct. 1881), defendants moved to vacate a writ of attachment on real property issued in a suit on a bond secured by a mortgage on the grounds that *L.* 1881, *c.* 147, enacted March 23, 1881, barred suits on bonds secured by mortgages until the mortgage was foreclosed. The bond and mortgage were executed on August 26, 1880. The Supreme Court affirmed the denial of the vacation of the writ of attachment and held that the statute as applied to said bond violated the New Jersey Contract Clause.

The *Baldwin* court analyzed the purpose and effect of the 1881 act and concluded that the statute did alter contractual rights.

The act, in effect, enlarges the time for the payment of the bond—the performance of the condition upon which it was made, for the indefinite period during which the foreclosure suit and the proceedings to effect a sale of the mortgaged premises may be pending.

The obligation of a contract is synonymous with the ability to enforce its performance. It consists in the power and efficacy of the law which applies to and enforces performance of it, or an equivalent for non-performance. Thus, if a party contracts to pay a certain sum on a certain day, the contract binds him to perform it on that day, and this is its obligation. 2 *Story on Const.*, § 1378. It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it, and the manner or degree in which this change is effected can in no respect influence the conclusion. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are part of the contract, however, minute or apparently immaterial in their effect upon it, impairs its obligation. [at 503]

In *N. J. Highway Authority* v. *Sills, supra,* in an action for a declaratory judgment by the bond trustees against the Attorney General, the court held two statutes permitting National Guard personnel and Army Reserve personnel driving to and from reserve training to travel the

Parkway without paying tolls to be invalid under the New Jersey Contract Clause:

> I have no doubt that if the statutes here in question are allowed to stand, they will impair the obligation of the contract with bondholders and their trustees. The position of every bondholder will have deteriorated to some extent. For a strong statement that the amount and extent of impairment is immaterial see 16 *Am. Jur.* 2d *"Constitutional Law"* § 446 (1964), where many authorities are listed. The question appears to narrow down to this: Are the statutes such a valid exercise of the state's police power as to represent a permissible impairment?
>
> The difficulty of defining the term "police power" hardly calls for comment. Many of the attempts at definition are mentioned in 16 *Am. Jur.* 2d, *"Constitutional Law"* § 261 and 262 (1964), and footnotes. However, I think it unnecessary to consider whether *Chapters* 352 and 414 of the Laws of 1968 represent an exercise of the State's police power. Assuming that they do, they are unlike the emergency legislation of *Hourigan,* [v. *North Brgen,* 113 *N. J. L.* 143] *Faitoute Iron & Steel Co.* [v. *City of Asbury Park,* 127 *N. J. L.* 239 and *Viex,* [v. *Sixth Ward etc.,* 310 *U. S.* 32, 60 *S. Ct.* 792, 84 *L. Ed.* 1061] the statutes dealt with in all three of those cases having been passed to relieve general and severe problems of the depression years. *Chapters* 352 and 414 have for their primary objective the conferring of personal benefits upon Guardsmen and Army Reservists. They are not an attempt to solve an emergency problem and are not

addressed to any problem of state-wide importance as was the Texas legislation considered in *City of El Paso.* [Simmons, 379 *U S.* 497, 85 *S. Ct.* 577, 13 *L. Ed.* 2d 446] The State, of course, has a legitimate interest in having members of the National Guard and Army Reserve attend training sessions as well as an interest in persuading new members to join. Perhaps some small measure of the persuasion might be the prospect of toll-free passage to and from training sessions.

Chapters 352 and 414 of the Laws of 1968 are relatively unimportant pieces of legislation. Free passage on New Jersey toll roads for Guardsmen and Army Reservists who are going to or coming home from training sessions is not vital to them, to the the plaintiffs or to anyone else. Mr. Justice Black, dissenting in *City of El Paso, supra* chided his colleagues of the majority with "balancing away the plain guarantee of *U. S. Const. Art.* I, § 10, that 'No State shall * * * pass any * * * Law Impairing the Obligation of Contracts. * * *' " To do that "balancing" the majority, as noted above, pointed out the great importance to Texas of the legislation which had cut down to five years the previously unlimited right to reinstate defaulted contracts to purchase state lands. In my judgment *City of El Paso* will not support a holding that ordinary and relatively unimportant legislation can impair the obligation of contracts without conflicting with the constitutional prohibition against impairment, even though the degree is small or even slight. I conclude that the two statutes in question are not such products of the legislative power of the State of New Jersey

> that they can stand in the face of the constitutional prohibitions against impairment of contract obligations; and that they are unconstitutional. [111 *N. J. Super.* at 319-321]

The Supreme Court affirmed for essentially the reasons stated below. 58 *N. J.* 432 (1971).

The test for impairment under Art. IV, § VII, par. 3, of the New Jersey Constitution in respect to remedies is more explicit than that of the Constitution of the United States of America. The language states:

> The Legislature shall not pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

In *Radar* v. *Southeasterly Road Dist.*, 36 *N. J. L.* 273 (Sup. Ct. 1873), a statute repealing the act incorporating defendant road district and transferring all its property and contracts to the Township of Union was held valid against contention that it deprived contractors with road district of a remedy. The court held that, at most, the contractors would lose the costs in their then pending suit because of the need to sue the township.

In *Radar* Justice DePue gave the historical background for the insertion of the language in the last clause at the 1844 Constitutional Convention and further states:

> This provision is peculiar to the constitution of this state and is regarded as having an important effect in restriction of the power of the legislature over remedies. *Sedg. on Stat. and Const. Law* 617 n. 656.

[*Id.* at 278].

Justice DePue explained the purpose of this provision:

> It is clear that any legislation, the effect of which is to deprive the party of the power to resort to the person or any property, which, as the law stood when the contract was made, might have been taken or applied in satisfaction of his demand, is within the constitutional prohibition. The evil at which this peculiar provision was mainly directed, was the construction put upon the provision of the constitution of the United States relative to the obligations of contracts, admitting the power of the state to pass laws abolishing imprisonment for debt, and exempting property from execution, and make such laws applicable to existing contracts, whereby the value of contracts in the ability to enforce performance was in many instances seriously impaired.
>
> It is equally clear that the legislature may make laws which incidentally affect the pursuit of remedies for enforcing existing contracts; as, for instance, such as regulate the admission of evidence, the course of practice in the courts, the mode of conducting sales under judgments and executions, and altering the forms of action, or prescribing periods for the limitation of actions within a reasonable time. In this class may be included acts changing a corporate name, or increasing corporate limits, and similar acts, altering or modifying in mere matters of form, the means of realizing the benefits of a contract, leaving the substance of the remedy unaffected. [at 280-281]

The language of the 1947 Constitution of New Jersey is identical to that of the 1844 Constitution.

Appendix B

Subject to the qualification about remedies based on the express language of the New Jersey Constitution, the Supreme Court of New Jersey, in its most recent consideration of the Contract Clause, has not indicated that New Jersey applies a different or narrower construction of the Contract Clause than that utilized by the United States Supreme Court. *Cf. New Jersey & Exposition Auth.* v. *McCrane, supra,* 61 *N. J.* at 26-30.

As earlier noted, there is no question that the rights involved are contract rights within the meaning of the relevant constitutional provisions. The inquiry, then, is whether the statute substantially impairs those rights — and this inquiry should probably be stringent because the Authority in this context is a public agency — and whether its enactment was necessary and reasonable for some general purpose.

II

The Attorney General has urged that by proper construction the statute does not pose any constitutional questions. He urges that the provisions of *L.* 1973, *c.* 370, do not change or modify the provisions of § 711 of the bond resolutions. "Absent some emergency which would compel the full deployment of the police power, the Governor is committed by *c.* 370 of the Laws of 1973 to honor the conditions set forth in the 1.2 ratio." Further, he argues that the veto power of the Governor does not touch the security provided for in § 711 of the resolutions but only the minutes of meetings. Since the power to derive the revenues to meet debt service is undisturbed, "the legislative modification of the means for payment is deemed to be without constitutional significance."

[3] a statute changing the officers who make decisions concerning the collection and distribution of a bond fund do not violate the Contract Clause.[4]

The bondholders interest is not in who sets the tolls but in the adequacy of the tolls. The Attorney General intends that "the Governor is precluded from intervening in the decision-making process so as to upset or diminish the 1.2 ratio. He has not done so. In any case, he is bound by the 1973 amendment to honor the covenants such as Section 711 made by the Authority for bondholders security."

This argument suggests that if conditions arise under § 711 that require an increase in tolls, the Governor is under a mandatory duty to give his consent, at least as to toll adjustments to satisfy those conditions; hence, the statute has no significance.

There are two difficulties with the suggested construction. First, where consent of another must be obtained in advance of action by an official or body, the existence of that consent is a jurisdictional prerequisite to the of-

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[4] *Reppel* v. *Board of Liquidation*, 11 *F. Supp.* 799, 804 (E. D. La. 1935); *Rorick* v. *Board of Comr's*, 57 *F.* 2d 1048, 1063 (N. D. Fla. 1932), vacated on jurisdictional grounds, 307 *U. S.* 208, 59 *S. Ct.* 808, 83 *L. Ed.* 1242 (1939); *Hall* v. *Underwood*, 258 *Ala.* 392, 63 *So.* 2d 683, 692-694 (Sup. Ct. 1953); *State ex rel. Urquhart* v. *Johnson*, 107 *Fla.* 624, 145 *So.* 880, 882 (*Sup. Ct.* 1933); *State ex rel. Porterie* v. *Walmsley*, 183 *La.* 139, 162 *So.* 826, 838-840 (Sup. Ct. 1935) app. dism. 296 *U. S.* 540, 56 *S. Ct.* 141, 80 *L. Ed.* 384 (1935); *Askew* v. *Smith*, 126 *S. C.* 159, 119 *S. E.* 378, 379 (Sup. Ct. 1923) *cf. California Highway Comm'n* v. *Ballard*, 77 *Cal. App.* 404, 247 *P.* 527, 531 (D. Ct. App. 1926); *Board of Ed.* v. *Dixson*, 202 *Okl.* 110, 210 *P.* 2d 669, 670 (Sup. Ct. 1949).

ficial or body acting on the matter. *Cf. Currie* v. *Atlantic City,* 66 *N. J. L.* 140 (Sup. Ct. 1901). Even if the statute is construed as suggested, there is no time limit specified within which the prerequisite consent must be given. Second, the Legislature's use of the word "consent" indicates that the Governor and other officials were to have some active role.

In *West Point Island Civic Ass'n* v. *Dover Tp. Comm.,* 93 *N. J. Super.* 206 (App. Div. 1966), certif. den. 48 *N. J.* 576 (1967), the Appellate Division reversed a judgment dismissing an action by plaintiff to compel defendant governing body to adopt a resolution consenting to a portion of the townhip being annexed to another muncipality, on ground that the trial judge erred in ruling that the governing body had an absolute right to withhold consent for any reason.

In that case plaintiffs had obtained more than enough signatures of the homeowners and landowners required under *N. J. S. A.* 40:43-26 and brought action to compel the governing body to adopt a resolution consenting to the annexation. In relevant part thte statute provides:

> Such petition shall also have attached thereto a certified copy of a resolution of the governing body of the municipality in which said land is located, consenting to said annexation, which resolution said governing body is hereby authorized and empowered to adopt.

They urged that in contrast to *N. J. S. A.* 40:43-26, which applied to the governing body of the municipality to which the territory was to be added and stated "may, in its discretion" act, no discretion was left to the governing body and the governing body had a duty to consent.

Appendix B

The Appellate Division said:

> • • • Consent to the petition by the governing body of the municipality of which the land is a part is a statutory *sine qua non* in the annexation procedure. If the Legislature had intended the giving of that consent to be a mere ministerial formality, it would have used clearer expressions of such intent. It would have "ordered" or "directed" such consent to be given, if the petition were found to be in order. When, instead, it merely "authorized and empowered" the governing body to adopt a resolution consenting to the annexation, the fair implication is that the Legislature was permitting, but not requiring the consent. The power to give or withhold that consent was vested in the governing body as the chosen representatives of all the people of the community. "Consent" itself implies a voluntary act, not statutory compulsion. *Cf. C. I. R.* v. *Long's Estate,* 304 *F.* 2d 136 (9 Cir. 1962), holding that a statute providing jurisdiction to do an act does not by that fact alone mandate the doing of the act. [at 209-210]

Consent has usually been construed to mean the doing of an act voluntarily when a person has the right, power or will not to do so. *Cf. State* v. *King,* 44 *N. J.* 346, 352-356 (1965); *Giroud* v. *New Jersey Mfrs. Cas. Ins. Co.,* 106 *N. J. L.* 238, 241 (E. & A. 1929).

The legislative statements attached to the bill which became the subject law indicate that the Legislature intended the Governor and one other designated official to have power and use it under the first paragraph of *L.* 1973, *c.* 370, qouted above on page 257.

Appendix B

The court has no doubt that any Governor of this State would act in good faith. But individuals of good faith can have reasonable differences of opinion. The time spent in litigation to resolve what is reasonable can be lengthy and time-consuming, particularly in respect to projected finances. See *Helmsley* v. *Fort Lee,* 78 *N. J.* 200 (1978).[5]

Review of the Sec. 711 provisions in the various resolutions, particularly the one dated July 27, 1971, show that those who acted on behalf of the bondholders sought and obtained a definite and precise method of dealing with the problem of inadequate toll revenue.

The Attorney General concedes that the method is fair and reasonable both as to the bondholders and as to the users of the Parkway.

Under the law as it now stands, if the Authority refused to act until it had the prior written consent of the Governor, and if § 711 dictated that tolls be adjusted, and if the Governor had not consented, the Trustees would have to commence actions against both the Governor and Authority. Those acting for the bondholders obtained express covenants to avoid this problem.

In *Patterson* v. *Carey,* 41 *N. Y.* 2d 714, 395 *N. Y. S.* 2d 411, 363 *N. E.* 2d 1146 (1977), the Court of Appeals reversed judgments of the lower courts upholding a statute rolling back toll increases initiated by a toll road au-

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[5] Neither the trustees nor defendants have referred to *L.* 1977, *c.* 361, found in *N. J. S. A.* 27:12B-14-1 and 2, requiring notice and public hearing before toll increases may be implemented. The court makes no comment thereon other than to note that the statement attached to that bill in the Legislature recites that Authority construed then existing law to require the Governor and one other to approve toll increases.

thority and providing for a four-step review procedure before tolls could be increased in the future.

The Court of Appeals summarized the statutory and bond provisions for the revenue bonds issued by the authority.

> * * * The authority issued bonds that were sold to the general investing public. In conjunction with the projected bond issue, the State adhered to its pledge, first made in 1939, not to limit or alter the rights vested in the authority to the detriment of holders of authority bonds issued after January 1, 1939. (Public Authorities Law, § 158-a). The Parkway reconstruction program was designed as a "self-liquidating" improvement; the cost of the project was to be borne by those who would benefit by it. To that end, the authority was empowered "[t]o charge tolls for the use of the part of the Southern state parkway improved by the authority subject to and in accordance with any agreements with bondholders made as hereinafter provided. The toll shall be ten cents unless the revenues from such tolls and the income from the facilties authorized by the foregoing provisions of this section are insufficient to meet all obligations of such agreements and to pay the costs of operating and maintaining the parkways and facilities operated and maintained by the authority pursuant to the foregoing provisions of this section. The revenue from such tolls and the income from such facilities shall be used only to meet such obligations and to pay the cost of constructing, reconstructing, operating and maintaining such parkways and facilities" (Public Authorities Law, § 153-b, subd. 5.) Toll receipts

were pledged to secure the authority's obligation on its bonds. [*Id.* at 717, 395 *N. Y. S.* 2d at 414, 363 *N. E.* 2d at 1149-1150]

It said:

> * * * The statute deprives the bondholders of property without due process of law in violation of the State Constitution. Further, the statute impairs the obligation of the State's own contract with bondholders and, thus, violates the contract clause of the Federal Constitution.
>
> In this case, the State granted to the authority the power to increase the toll on the Southern State Parkway and pledged not to limit or alter the rights vested in the authority to the detriment of the bondholders (Public Authorities Law, §§ 153-a, 153-b, subd. 5.) Since the toll is the sole source of funds for bond repayment, any limitation on the authority's power to collect a toll sufficient to pay the bonds deprives the bondholders of an essential attribute of their contract with the authority and with the State and jeopardizes their investment. The statute under consideration suspends a toll increase imposed by the authority and conditions any future increases upon compliance with a complicated and time-consuming procedure. Bondholders were promised, as part of the arrangement which financed the reconstruction of the highway, that the authority could raise the toll if the authority, in its discretion, deemed an increase necessary to pay its operating expenses and meet its bond obligations. With the present statute, the Legislature has diminished the bondholders' rights by suspend-

ing one increase and limiting the authority's previously broad discretion to impose future increases. Thus, the statute has deprived the bondholders of a right granted by their contract with the authority and the State. [*Id.* at 720, 395 *N. Y. S.* 2d at 416, 363 *N. E.* 2d at 1151-1152]

In respect to the Contract Clause, it said:

The Federal Constitution bars the States from enacting legislation impairing the obligation of contracts. (U. S. Const., art. I, § 10). In its covenant with the holders of authority bonds, the State pledged to vest the authority with the power to raise tolls, in its sole discretion, if toll revenues become insufficient to meet the obligations of indebtedness and to pay the costs of operating and maintaining the Parkway and related facilities. (Public Authorities Law, § 153-b, subd. 5.) The State also pledged not to limit or alter the rights vested in the authority to the detriment of authority bondholders. (Public Authorities Law, § 158-a.) Since toll revenues are the sole source of funds for bond-repayment, the provision granting the authority the power to increase tolls was an important security provision. Bondholders were guaranteed that the authority would have the necessary power to raise tolls in order to pay authority obligations. This, obviously, was no small concession, nor was it superfluous. A statute which conditions the authority's power to increase tolls upon compliance with a review procedure involving the intervention of others from outside the authority is a blow to the independence of the authority's judg-

ment. Intercession by others outside the authority is not what the bondholders contracted for.

* * *

Just as abrogation of a debt limit threatened the rights of Port Authority bondholders, infringement upon the right to set a proper toll invaded the contractual rights of Jones Beach State Parkway Authority bondholders. It is not necessary that the impairment totally destroy the obligation of the contract. The extent of the impairment is, however, a relevant factor in considering the reasonableness of the impairment. (*United States Trust Co. of N. Y.* v. *New Jersey*, 431 *U. S.* 1, 27, 97 *S. Ct.* 1505, 1520, 52 *L. Ed.* 2d 92, *supra.*) [Id. at 721-722, 395 *N. Y. S.* 2d at 417-418, 363 *N. E.* 2d at 1152-1153]

The subject provision in the statute in question does not shift the responsibility from making the decision to implement a change in tolls from one body to another body or person subject to the same standards as was the factual pattern in the cases noted in footnote 4. The subject provision imposes a pre-condition upon the performance of a duty owed to the holders of the bonds in the basic security for the payment of interest and principal.

If the only bonds in question were the ones subject to the unconditional guarantee of the payment of interest and principal by the State, then a court might be able to consider the impairment as insubstantial. The State's guarantee, however, does not apply to the 1971 Improve-

ment Bonds. The computations to determine what toll revenues are adequate to service these bonds necessarily have to provide for the debt service on the earlier bonds; hence, the State's guarantee of those bonds for purposes of resolution of this matter as it presently stands is irrelevant.

[4] The court concludes that the provisions of *L.* 1973, *c.* 370, stating that

> No resolution or other action of the authority providing * * * for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the Authority without the prior approval in writing of the Governor and at least one of the following: the State Treasurer and the Comptroller of the Treasury * * *

does impair the contract rights of the holders of the bonds of the Authority heretofore issued in violation of the Contract Clause of both the Constitution of the United States and of the State of New Jersey, and particularly the provision of the New Jersey Constitution prohibiting "depriving a party of any remedy for enforcing a contract which existed when the contract was made." The aforesaid law does not provide an alternative remedy but injects an additional high hurdle to be cleared. The court further concludes that the impairment is substantial.

The only justification advanced, and the only evidence in support of the need and reasonableness, for the adoption of this statute is that the Governor has this power

over other authorities.[6] There is no legislative finding that there is a general problem involving the public health, morals or welfare which this provision will solve. There are no facts before the court indicating such a situation.

As developed by the materials submitted and the arguments advanced, this is the only provision of the statute which has been questioned. It is the provision that is of concern to the trustees and to the bondholders whom they represent.

Regarding the trustees' argument that the other provisions of the subject act destroy the autonomy of the Authority, different considerations exist.

In the statement attached to the bill that became *L.* 1973, *c.* 370, it is said:

> The New Jersey Highway Authority, whose primary function is to operate the Garden State Parkway but of late has also included additional projects like the construction of the Garden State Art Center, is approximately a ½ billion dollar operation. * * * The importance of the projects under the jurisdiction of the State agency to the people of this State cannot be overstated. Its continued

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[6] The provision in the law for the Governor to veto minutes of the Port of New York and New Jersey Authority was part of the legislation as originally enacted. *N. J. S. A.* 32:1-1 *et seq.* That situation does not present a Contract Clause problem because the power existed before the bonds were issued. Authority has referred to a number of other statutes which have been enacted over the years giving the Governor the same powers over other authorities. These statutes are not involved in this case.

> operation and development in a manner so as to serve the best interests of the State of New Jersey and its citizens is of the highest priority and therefore, to insure such operation and development, it must have its activities scrutinized by the only State officer elected by all the people of this State, the Governor.

The reports of the Authority submitted to the court show that the Garden State Arts Center presents artists of both international and national reputation in dance, ballet, in both popular and classical music, and in entertainment generally. It operates close to a break-even point and is assisted by fund-raising activities of third parties to meet the deficit.

The need for the State to prevent Authorities, which rely upon revenues to pay indebtedness, from engaging in collateral projects which may not only jeopardize their finances but also undertake functions which the State has assigned to other situations, is a need of the public in general to see to the orderly utilization of state resources.

[5] To the extent that the other sections of *L.* 1973, *c.* 370, may impair covenants that there will be no other supervisory body over the Authority, this court finds such an impairment not to be substantial and to be for a public need and thus reasonable.

III

Except for correcting the name of the Executive Department in which the Authority is located and the effective date of the act, *L.* 1973, *c.* 370, only contains the original

provisions of § 4 and of the two paragraphs quoted above. It does not contain a severability clause. It was enacted as an amendment to L. 1952, *c.* 16. *N. J. S. A.* 27:12B-1 *et seq.*

N. J. S. A. 27:12B-25 provides:

> If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of the act which can be given effect without the invalid provisions or applications and to this end the provisions of this act are declared to be severable.

In *Affiliated Distillers Brands Corp.* v. *Sills,* 56 *N. J.* 251 (1970), same case following remand 60 *N. J.* 342 (1972), our Supreme Court held that an entire section of the amendtory statute dealing with exemption for grandfather licenses rather than a portion thereof had to be invalidated.

In respect to severability the Supreme Court said:

> Severability is a question of legislative intent. That intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principal object of the statute. 56 *N. J.* at 265; *N. J. Chapt., Am. I. P.* v. *N. J. State Bd. of Prof. Planners,* 48 *N. J.* 581, 593, appeal dismissed and *cert. denied,* 389 *U. S.* 8, 88 *S. Ct.* 70, 19 *L. Ed.* 2d 8 (1967); *Angermeier* v. *Borough of Sea Girt,* 27 *N. J.* 298, 311 (1958). To justify severance of a part of a statute "there must be such a manifest independence of the parts as to clearly indicate a legislative in-

tention that the constitutional insufficiency of the one part would not render the remainder inoperative." *Washington National Ins. Co.* v. *Board of Review,* 1 *N. J.* 545, 556 (1949); *Yanow* v. *Seven Oaks Park, Inc.,* 11 *N. J.* 341, 361 (1953).

* * *

In view of the proofs that a large number of "grandfathers" holding a substantial volume of the business would be adversely affected by a decision that the "grandfather clause" was severable, we cannot say with assurance that the Legislature would have intended the remainder of the statute to stand alone. Where there is doubt, as here, we believe that we should treat the paragraph as an entity rather than sever the offending part. Were we to do otherwise, we might usurp the legislative function of lawmaking. See *N. J. Chapt., Am. I. P.* v. *N. J. State Bd. of Prof. Planners, supra,* 48 *N. J.* at 594. [60 *N. J.* at 345-346]

Analysis of *L.* 1973, *c.* 370, shows that the Legislature's basic objective was to control future activity of the Authority and that it expresses a desire not to interfere with existing rights of bondholders, although this court has concluded that it has that effect in respect to outstanding bonds.

[6] Even without a severability clause ,this court concludes that the portion of the statute which is invalid may be severed because the remainder is consistent with the aim of the Legislature to regulate future activity of the Authority and is independent of the invalid portion.

The trustees represent bondholders who have a right to receive prinicpal and interest only. Bondholders, unlike

stockholders, have no right to select management or control management's action except as set forth in the debt instruments. When the debts are paid, those limitations will be extinguished. If potential investors find the law objectionable, they may refuse to invest.

[7] However, during the existence of the debts under the various resolutions heretofore adopted, any veto of any action, such as the appointment of traffic consultants to do the work required under § 711 or to provide the insurance required under § 712, would be invalid as a violation of the Contract Clause in that it would deprive the bondholders of essential security by means of applying a subsequently enacted statutory power. To the extent that the second paragraph of the statute may be read to authorize the violation of such an express covenant as the provision for insurance, this court holds that such provision is so construed and applied would violate the Contract Clause.

[8] Even if invalid on such an application to the security provisions of the various resolutions, this court concludes that such an application may be treated as severable and that portion of the statute held valid for the reasons heretofore stated.

IV

The question to be answered herein is the one posed by the Authority, namely, whether the trustees must show specific bondholders relied on the covenants in question to be entitled to judgment. The court's conclusions heretofore stated establish that the rights of the bondholders for whom the trustees act are violated by the subject law.

There is no need to restate the conclusions in III, *supra.*

[9] In respect to the failure of the trustees to show that any bondholder purchased his, her or its bonds in reliance upon the covenants broken, the court concludes that under the circumstances of this case that is not necessary.

In *N. J. Highway Authority* v. *Sills, supra,* in the second action before the trial court, the judge agreed with the factual argument of the intervening reservists that the loss of $27,000 annually to the Authority would not cause an event of default. However, the judge did not accept their legal argument that the small dollar value of the impairment to each bondholder therefore saved the statutes permitting reservists to travel the roads without pay toll from being invalid.

> I have no doubt that if the statutes here in question are allowed to stand, they will impair the obligation of the contract with the bondholders and their trustees. The position of every bondholder will have deteriorated to some extent. For a strong statement that the amount and extent of impairment is immaterial see 16 *Am. Jur. 2d "Constitutional Law"* § 446 (1964) where many authorities are listed. * * * [111 *N. J. Super.* at 319]

Although there is some discussion of reliance in a few of the cases arising under the Contract Clause, under the circumstances of this case the court concludes that the absence of any evidence that a particular bondholder relied upon the provisions of § 711 in purchasing bonds is not significant in this case in determining "whether the state law has, in fact, operated as a substantial im-

pairment of a contractual relationship." *Allied Structural Steel Co.* v. *Spannaus, supra,* —— *U. S.* at ——, 98 *S. Ct.* at 2723, 57 L. Ed. 2d at 736.

Those who acted for the bondholders in connection with the 1971 Improvement Bonds by the language used in § 711 focused on the problem of speedy adjustment of toll revenues. They provided that if adjustments were not made, then upon application of holders of 10% in principal amount of bonds, the trustee must institute legal action. Under the default provisions of earlier bonds the trustee is not required to act upon application of holders of less than 25% of the principal amount of bonds. This is a significant difference, particularly since the 1971 Improvement Bonds are not guaranteed by the State.

The court concludes that the trustees have made an adequate showing to be entitled to judgment.

The Attorney General has not conceded that the statute in unconstitutional, as he did in the first action in *New Jersey Highway Authority* v. *Sills, supra.* The fact that the Legislature has enacted several similar statutes applicable to other authorities which have issued revenue bonds convinces the court that the question is substantial. The Attorney General may appear in all cases where statutes are questioned on constitutional grounds. *R.* 4:28-4. He did appear and filed an answer basically designed to defend the power of the Governor. The court concludes that there is jurisdiction to enter an appropriate judgment declaring portions of *L.* 1973, *c.* 370, invalid as violating the Contract Clause for the reasons stated above.

Appendix B

Counsel for Trustees shall submit an appropriate judgment[7] and advise the court whether they shall waive the claim for damages.

[7] While this decision was being typed, the parties hereto filed a stipulation that all bonds issued under the July 7, 1971 resolution had been retired; hence, Midlantic National Bank no longer had any bondholders for whom it acted. The court decided not to edit the opinion to reflect this. However, it will not be a party to settle the form of any final judgment.

APPENDIX C

Relevant Sections of the New Jersey Highway Authority Act, N.J. Stat. Ann §§27:12B-1 to -35 (West 1966 & Cum. Supp. 1980-1981)

CHAPTER 12B—New Jersey Highway Authority

Section

27:12B-1 Short title

27:12B-2 Highway projects authorized

27:12B-3 Definitions

27:12B-4 New Jersey Highway Authority; establishment; members; issuance of bonds or fixing of tolls; approval of state officers; approval of actions by Governor.

27:12B-5 Powers of Authority

27:12B-5.2 Contracts; Standing operating rules and procedures; bids.

27:12B-8 Bonds and notes

27:12B-9 Resolution authorizing issuance of bonds or notes; payment; security.

27:12B-10 Bonds or notes not a debt or liabiliy of State or any political subdivision.

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27:12B-12 Legal investments, bonds and notes.

27:12B-14 Tolls and charges; contracts for use of property along paved portion for gas stations and other uses.

27:12B-14.1 Tolls and charges; increase or establishment; public hearing

Appendix C

27:12B-1. Short title

This act[1] shall be known as, and may be cited as, "The New Jersey Highway Authority Act." L.1952, c. 16, p. 65 § 1.

27:12B-2. Highway projects authorized

In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known safety device including center divisions, ample shoulder widths, long-sighted distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads, the New Jersey Highway Authority (hereinafter created) is hereby authorized and empowered to acquire construct, maintain, improve, repair and operate highway projects (as hereinafter defined) at the locations hereinafter established and at such other locations as shall be established by law, and to pay or share in the cost of the construction, reconstruction or improvement of all or any part of any public highway which connects with any project or connects parts of a project or 2 or more projects, under agreements with respect to such construction, reconstruction or improvement entered into by the authority with the commissioner, who is hereby authorized to enter into and perform such agreements and shall expend any sums received pursuant to such agreements in accordance with the terms thereof. L.1952, c. 16, p. 65, § 2, as amended L.1961, c. 25,p. 111, § 1.

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[1] Sections 27:12B-1 to 27:12B-26.

Appendix C

27:12B-3. Definitions

As used in this act the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

(a) "Authority" means the New Jersey Authority, created by section 4 of this act,[1] or, if said authority shall be abolished, the board, body or commission succeeding to the principal functions thereof or to whom the powers given by this act to the authority shall be given by law.

(b) "Commissioner" means the State Highway Commissioner.

(c) "Department" means the State Highway Department.

(d) "Project" or "highway project" means any express highway, superhighway or motorway at such locations and between such termini as herein established or as may hereafter be established by law, and acquired or to be acquired or constructed or to be constructed under the provisions of this act by authority, over which abutters have no easement or rights of lift, air or direct access by reason of the fact that their properties abut thereon, together with such adjoining park or recreational areas and facilities *directly related to the use of the express highway, superhighway or motorway* as the authority, with the concurrence of the Department of Conservation and Economic Development, shall find to be necessary and desirable [to promote the public health and welfare]* *for the convenience and confort of users of the highway project* and feasibile

[1] Section 27:12B-4.

* Matter in brackets [ ] is stricken in the original.

for development pursuant to this act, and shall include but not limited to all bridges, tunnels, overpasses, underpasses, interchanges, traffic circles, grade separations, entrance plazas, approaches, toll houses, servce areas, service stations, service facilities, communications facilities, and administration, storage and other buidings which the authority may deem necessary for the operation of such project, together with all property, rights, easements and interests which may be acquired by the authority for the construction or the operation of such project.

"Project" or "ferry project" also means a ferry service for the transportation of passenger and freight between such termini as are herein establshed or as may hereafter be established by law, and shall include but shall not be limited to ferries and other craft, bulkheads, docks, piers, wharves, warehouses, ferry terminals and stations, parking areas, service stations, service facilities, communication facilities and administration and other buildings which the authority may deem necessary for the operation of such project, together with all property, rights easements and interests, including land under water and riparian rights, which may be acquired by the authority for the construction or operation of such project.

(e) "Bonds" or "revenue bonds" means bonds of the authority authorized under the provisions of this act or any amendment thereof or supplement thereto.

(f) "Public highway" means and shall include any public highway, road or street in the State, whether maintained by the State or by any county, city, borough, town, township, village, or other political subdivision.

(g) "Feeder road" means any road which in the opinion of the authority is necessary to create or facilitate access to a projet.

(h) "Owner" means and shall include all individuals, copartnerships, associations, private or municipal corporations and all political subdivisions of the State having any title or interest in any property, rights, easements and interests authorized to be acquired by this act.

Amended by L.1968, c. 348, § 1, eff. Nov. 18, 1968.

27:12B-4. New Jersey Highway Authority; establishment; members; issuance of bonds or fixing of tolls; approval of state officers; approval of actions by governor

There is hereby established in the State Department of Transportation a body corporate and politic, with corporate succession, to be known as the "New Jersey Highway Authority." The authority is hereby constituted an instrumentality exercising public and essential governmental functions, and the exercise by the authority of the powers confered by this act in the construction, operation and maintentance of projects shall be deemed and held to be an essential governmental function of the State.

The New Jersey Highway Authority shall consist of [five]* seven members, each of whom shall be a resident of the State, who shall have been a qualified elector therein for a period of at least 1 year next preceding his appointment. Each member of the authority shall be appointed by the Governor, with the advice and consent of the Senate, for a term of 5 years and shall serve until his successor is appointed and has qualified. *Of the two members first appointed pursuant to this amendatory act, one*

* Matter in brackets [ ] is stricken in the original.

shall be for a term of 4 years and one for a term of 5 years. Each member of the authority may be removed from office by the Governor, for cause, after a public hearing. Each member of the authority before entering upon his duties shall take and subscribe an oath to perform the duties of his office faithfully, impartially and justly to the best of his ability. A record of such oaths shall be filed in the office of the Secretary of State.

Any vacancies in the membership of the authority occurring other than by expiration of term shall be filled in the same manner as the original appointment, but for the unexpired term only.

The Governor shall designate one of the members of the authority as chairman thereof and another member as vice-chairman thereof. The chairman and vice-chairman of the authority so designated shall serve as such at the pleasure of the Governor and until their respective successors have been designated. The authority shall elect a secretary and a treasurer who need not be members. At the option of the authority the same person may be elected to serve both as secretary and treasurer. [Three]* *Four* members of the authority shall constitute a quorum and the vote of [three]* *four* members shall be necessary for any action taken by the authority. No vacancy in the membership of the authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the authority.

Before the issuance of any bonds or notes under the provisions of this act, each member of the authority shall execute a surety bond in the penal sum of $25,000.00, and

* Matter in brackets [ ] is stricken in the original.

the treasurer shall execute a surety bond in the penal sum of $50,000.00, each such surety bond to be conditioned upon the faithful performance of the duties of the office of such member or treasurer, as the case may be, to be executed by a surety company authorized to transact business in the State of New Jersey as surety and to be approved by the Attorney General and filed in the office of the Secretary of State.

No resolution or other action of the authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the authorty without the prior approval in writing of the Governor and at least one of the following: the State treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.

A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certification of the secretary thereof, to the Governor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays

and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof by the Governor prior thereto. If, in said 10-day period, the Governor returns such copy of the minutes with veto of any action, except action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, taken by the authority or any member thereof at such meeting, such action shall be null and of no effect.

The members of the authority shall not receive compensation for their services as members of the authority. Each member shall be reimbursed by the authority for his actual expenses necessarily incurred in the performance of his duties.

Amended by L.1970, c. 28, § 1; L.1973, c. 370, § 1, eff. Jan. 7, 1974; L.1975, c. 5, § 1.

27:12B-5. Powers of Authority

The Authority shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:

(a) To adopt by-laws for the regulation of its affairs and the conduct of its business;

(b) To adopt an official seal and alter the same at pleasure;

(c) To maintain an office at such place or places within or without the State as it may designate;

(d) To sue and be sued in its own name;

(e) To acquire, construct, maintain, repair and operate projects;

(f) To acquire, lease, build, improve, maintain and operate one or more ferry boats and other craft between a point in Cape May county, New Jersey, and a point in Lewes, Delaware, and to transport passengers and freight between said points by means of such boats;

(g) To acquire in co-operation with the Department of Conservation and Economic Development limited roadside areas adjoining said projects and transfer any or all of such areas to the Department of Conservation and Economic Development so that said department may maintain such areas as roadside parks;

(h) To issue bonds or notes of the Authority and to provide for the rights of the holders thereof as provided in this act;

(i) To fix and revise from time to time and charge and collect tolls or other charges for transit over or use of any project acquired or constructed by it;

(j) To establish and enforce rules and regulations for the use of any project;

(k) To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act;

(*l*) To acquire in the name of the Authority by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain, any land and other property, including land under water and riparian rights, within or without the State of New Jersey, which it may determine is reasonably necessary for any project or for the relocation or reconstruction of any public highway by the Authority under the provisions of this act or for the construc-

tion of any feeder road which the Authority is or may be authorized to construct and any and all rights, title and interest in such land and other property, including public lands, parks, playgrounds, reservations, highways or parkways, owned by or in which any county, city, borough, town, township, village, or other political subdivision of the State of New Jersey has any right, title or interest, or parts thereof or rights therein and any fee simple absolute or any lesser interest in private property, and any fee simple absolute in, easements upon, or the benefit of restrictions upon abutting property to preserve and protect projects;

(m) To locate and designate, and to establish, limit and control such points of ingress to and egress from each project as may be necessary or desirable in the judgment of the Authority to insure the proper operation and maintenance of such project, and to prohibit entrance to such project from any point or points not so designated;

(n) To take title or any lesser interest to any land or other property in the State of Delaware in any manner permitted by the laws of Delaware. Whenever such property located in the State of Delaware cannot be acquired by the Authority in its name or in that of its nominee or trustee by agreement, and the Highway Department of the State of Delaware is willing to condemn such property for the use of the project if reimbursed by the Authority for the condemnation money or damages awarded in such condemnation and the expenses thereof, the Authority is authorized and empowered to enter into an agreement of reimbursement with the Highway Department of the State of Delaware for such condemnation money or damages and expenses and to secure the same by a deposit of cash or otherwise and to reimburse the Highway Department of

the State of Delaware or other proper department or agency of the State of Delaware for all condemnation money or damages and costs legally awarded or incurred in such condemnation;

(*o*) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act;

(p) To construct, maintain, repair and operate any feeder road or any public highway connecting parts of a project or two or more projects which in the opinion of the Authority will increase the use of a project or projects, to take over for maintenance, repair and operation any existing public highway as a feeder road, and to realign any such existing public highway and build additional sections of road over new alignment in connection with such existing public highway;

(q) To appoint such additional officers (who need not be members of the Authority) and employ such consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers and other employees and agents as the Authority deems advisable and as may be necessary in its judgment; to fix their compensation; and to promote and discharge such officers, employees and agents; all without regard to the provisions of Title 11 of the Revised Statutes;

(r) To receive and accept from any Federal agency, subject to the approval of the Governor, grants for or in aid of the acquisition or construction of any project, and to receive and accept aid or contributions, except appropriations by the Legislature, from any source, of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made;

(s) To do all acts and things necessary or convenient to carry out the powers and duties expressly provided in this act; and

(t) To exercise all of the foregoing powers in the State of Delaware in so far as permitted by the laws of that State, and to apply to the authorities in the State of Delaware for all franchises, permits and licenses necessary to exercise such powers.

Nothing contained in this act shall be construed to authorize or empower the Authority to acquire State property by the exercise of the power of eminent domain. L. 1952, c. 16, p. 69, § 5, as amended L.1953, c. 164, p. 1419, § 5.

27:12B-5.2. Contracts; standing operating rules and procedures; bids

The New Jersey Highway Authority, in the exercise of its authority to make and enter into contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers, shall adopt standing operating rules and procedures providing that, except as hereinafter provided, no contract on behalf of the authority shall be entered into for the doing of any work, or for the hiring of equipment or vehicles, where the sum to be expended exceeds the sum of $2,500.00 unless the authority shall first publicly adverise for bids therefor, and shall award the contract to the lowest responsible bidder, provided, however, that such advertising shall not be required where the contract to be entered into is one for the furnishing or performing services of a professional nature or for the supplying of any product or the rendering of

any service by a public utility subject to the jurisdiction of the Board of Public Utility Commissioners of this State and tariffs and schedules of the charges, made, charged, or exacted by the public utility for any such products to be supplied or services to be rendered are filed with the said board.

This section shall not prevent the authority from having any work done by its own employees, nor shall it apply to repairs, or to the furnishing of materials, supplies or labor, or the hiring of equipment or vehicles, when the safety or protection of its or other public property or the public convenience require, or the exigency of the authority's service will not admit of such advertisement. In such case the authority shall, by resolution, passed by the affirmative vote of a majorty of its members, declare the exigency or emergency to exist, and set forth in the resolution the nature thereof and the approximate amount to be expended.

L.1968, c. 459, § 1, eff. Feb. 21, 1969.

27:12B-8. Bonds and notes

(a) The Authority shall have the power and is hereby authorized from time to time to issue its negotiable bonds or notes of any of its corporate purposes, including the payment, funding or refunding of principal of or interest or redemption premiums on any bonds or notes issued by it whether the bonds or notes to be funded or refunded have or have not matured.

(b) Except as may be otherwise expressly provided by the Authority, every issue of bonds or notes shall be general obligations payable out of any moneys or revenues

of the Authority, subject only to any agreements with the holders of particular bonds or notes pledging any particular moneys or revenues.

(c) Whether or not bonds or notes issued by the Authority are of such form and character as to be negotiable instruments, such bonds and notes shall be fully negotiable within the meaning and for all purposes of the Negotiable Instruments Law.

(d) The Authority may issue temporary or interim bonds, pending the preparation of definitive bonds, exchangeable for definitive bonds.

(e) Bonds and notes shall be authorized by resolution of the Authority and shall bear such date or dates, mature at such time or times, bear interest at such rate or rates not exceeding six per centum (6%) per annum, be in such denominations, be in such form either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment and at such place or places, and be subject to such terms of redemption with or without premium as such resolution or resolutions may provide. Bonds or notes may be sold at public or private sale, for such price or prices as the Authority shall determine.

(f) Any resolution of the Authority authorizing the issuance of bonds or notes may appoint a trustee or trustees, a paying agent or paying agents, or such other fiduciaries as such resolution may provide. Any trustee, paying agent and other fiduciary so appointed may be any trust company or bank having the power of a trust company within or without the State. L.1952, c. 16, p. 77, § 8.

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27:12B-9. Resolution authorizing issuance of bonds or notes; payment; security

(a) In order to secure the payment of its bonds or notes, the Authority shall have power in the resolution authorizing the issuance thereof (which shall constitute a contract with the holders thereof):

(i) to pledge all or any part of its tolls or revenues to which its right then exists or may thereafter come into existence, and the moneys derived therefrom, and the proceeds of bonds or notes;

(ii) to covenant against pledging all or any part of its tolls or revenues, or against mortgaging all or any part of its real or personal property then owned or thereafter acquired, or against permitting or suffering any lien on such tolls, revenues or property; to covenant with respect to limitations on any right to sell, lease or otherwise dispose of any project or any part thereof, or any property of any kind;

(iii) to covenant as to the bonds and notes to be issued and the limitations thereon and the terms and conditions thereof and as to the custody, application and disposition of the proceeds thereof, and to covenant as to the issuance of additional bonds or notes or as to limitations on the issuance of additional bonds or notes and on the incurring of other debts by it;

(iv) to covenant as to the payment of the principal of or interest on the bonds or notes, or any other obligations, as to the sources and methods of such payment, as to the rank or priority of

any such bonds, notes or obligations with respect to any lien or security or as to the acceleration of the maturity of any such bonds, notes or obligations;

(v) to provide for the replacement of lost, destroyed or mutilated bonds or notes;

(vi) to covenant against extending the time for the payment of bonds or notes or interest thereon;

(vii) to consent as to the redemption of bonds or notes and privileges of exchange thereof for other bonds or notes of the Authority;

(viii) to covenant as to the rates of toll and other charges to be established and charged, the amount to be raised each year or other period of time by tolls or other revenues and as to the use and disposition to be made thereof; to create or authorize the creation of special funds or moneys to be held in pledge or otherwise for construction, operating expenses, payment or redemption of bonds or notes, reserves or other purposes and to covenant as to the use and disposition of the moneys held in such funds;

(ix) to establish the procedure, if any, by which the terms of any contract or covenant with or for the benefit of the holders of bonds or notes may be amended or abrogated, the amount of bonds or notes the holders of which must consent thereto, and the manner in which such consent may be given;

(x) to covenant as to the maintenance of its real and personal property, the replacement thereof, the insurance to be carried thereon, and the use and disposition of insurance moneys;

(xi) to provide for the rights and liabilities, powers and duties arising upon the breach of any covenant, condition or obligation; to prescribe the events of default and the terms and conditions upon which any or all of the bonds or notes shall become or may be declared due and payable before maturity and the terms and conditions upon which any such declaration and its consequences may be waived;

(xii) to vest in a trustee or trustees such property, rights, powers and duties in trust for the holders of bonds or notes as the Authority may determine; to limit or abrogate the rights of the holders of such bonds or notes to appoint such trustee, or to limit the rights, duties and powers of such trustee;

(xiii) to limit the rights of the holders of bonds or notes to enforce any pledge or covenant securing the bonds or notes; and

(xiv) to make covenants other than and in addition to the covenants herein expressly authorized, of like or different character; and to make such covenants to do or refrain from doing such acts and things as may be necessary or covenient or desirable in order to better secure the bonds or notes or which, in the absolute discretion of the Authority, will tend to make the bonds or notes more marketable, notwithstanding that such covenants, acts or things may not be enumerated herein.

(b) Any pledge of tolls or other revenues or other moneys made by the Authority shall be valid and bind-

ing from the time when the pledge is made; the tolls or other revenues or other moneys so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or futher act, and the lien of such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be filed or recorded except in the records of the Authority. Resolutions providing for the issuance of bonds or notes shall not convey or mortgage any project or any part thereof.

(c) Bonds or notes may be issued under the provisions of this act without obtaining the consent of any department, division, commission, board, bureau or agency of the State, and without any other proceeding or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this act.

(d) The Authority shall not have power to mortgage real property.

(e) Moneys of the Authority or moneys held in pledge or otherwise for the payment of bonds or notes or in any way to secure bonds or notes and deposits of such moneys may be secured in such manner as the Authority may require and all banks and trust companies are authorized to give such security therefor.

(f) Neither the members of the Authority nor any person executing bonds or notes shall be liable personally on the bonds or notes or be subject to any personal liability or accountability by reason of the issuance thereof.

(g) The Authority shall have the power to purchase bonds or notes out of any funds available therefor. The Authority may hold, cancel or resell such bonds or notes subject to and in accordance with agreements with holders of its bonds and notes. L.1952, c. 16, p. 78, § 9.

27:12B-10. Bonds or notes not a debt or liability of State or any political subdivision

Except as otherwise provided by or pursuant to any law or laws hereafter submitted to the people pursuant to Section II of Article VIIII of the State Constitution and approved by a majority of the legally qualified voters of the State voting thereon, bonds or notes issued under the provisions of this act shall not constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, and all such bonds or notes shall contain on the face thereof a statement to that effect. L.1952, c. 16, p. 82, § 10.

27:12B-11. Pledge of State to holders of bonds and notes

The State of New Jersey does pledge to and agree with the holders of the bonds or notes issued pursuant to authority contained in this act, that the State will not limit or restrict the rights hereby vested in the Authority to maintain, acquire, construct, reconstruct and operate any project as defined in this act or to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation thereof and to fulfill the terms of any agreements made with the holders of bonds

or notes authorized by this act or in any way impair the rights or remedies of the holders of such bonds or notes until the bonds and notes, together with interest thereon, are fully paid and discharged. L.1952, c. 16, p. 82, § 11.

27:12B-12. Legal investments, bonds and notes as

Notwithstanding any restriction contained in any other law, the State and all political subdivisions of this State, their officers, boards, commissions, departments or other agencies, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, in vestment companies and other persons carrying on a banking or investment business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries, and all other persons whatsoever who now are or may hereafter be authorized to invest in bonds or other obligations of the State, may properly and legally invest any sinking funds, moneys or other funds, including capital, belonging to them or within their control in any bonds or notes issued by the authority under the provisions of this act; and said bonds and notes are hereby made securities which may properly and legally be deposited with and received by any State or municipal officers or agency of the State for any purpose for which the deposit of bonds or other obligations of the State is now or may hereafter be authorized by law. L.1952, c. 16, p. 82, § 12, as amended L.1961, c. 25, p. 112, § 2.

Appendix C

27:12B-14. Tolls and charges; contracts for use of property along paved portion for gas stations and other uses

The Authority is hereby authorized to fix, revise, charge and collect tolls and charges for the use of each project and the different parts or sections thereof, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining a paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages, stores, hotels, and restaurants, or for any other purpose except for tracks for railroad or railway use, and to fix the terms, conditions, rent and rates of charges for such use; *provided,* that a sufficient number of gas stations may be authorized to be established in each service area along any project to permit reasonable competition by private business in the public interest; and *provided, further,* that no contract shall be required, and no rent, fee or other charge of any kind shall be imposed, for the use and occupation of the highway portion of any projet for the installation, construction, use, operation, maintenance, repair, renewal, relocation or removal of tracks, pipes, mains, conduits, cables, wires, towers, poles or other equipment or appliances in, on, along, over or under any such project by any public utility as defined in section 27:7-1 of the Revised Statutes which is subject to taxation pursuant to either chapter four of the laws of nineteen hundred and forty, as amended (R.S. 54:31-15.14 et seq.), or chapter five of the laws of nineteen hundred and forty, as amended (R.S. 54:31-45 et seq.), or pursuant to any other law imposing a tax for the privilege of using the public streets, highways, roads or other public places in this State. Such tolls and charges shall be so fixed

and adjusted as to effectuate the purposes of this act and in any event to carry out and perform the terms and provisions of any contract with or for the benefit of holders of bonds or notes. Such tolls and charges shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State. The use and disposition of tolls, charges and revenues shall be subject to the provisions of any resolution authorizing the issuance of such bonds or notes. L.1952, c. 16, p. 83, § 14.

27:12B-14.1. Tolls and charges; increase or establishment; public hearing

The authority shall, whenever it desires to increase any existing toll or establish any new toll for the use of any project and the different parts or sections thereof, hold a public hearing on such proposed toll at least 45 days prior to the date on which such toll is proposed to become effective.

L.1977, c. 361, § 1, eff. Feb. 1, 1978.

APPENDIX D

Notice of Appeal to the Supreme Court of the United States

(Filed—April 30, 1981)

SUPREME COURT OF NEW JERSEY

A-2 SEPTEMBER TERM 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under by virtue of Chapter 16 of the Laws of 1952, as amended and supplemented and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Respondents.

Appendix D

Notice is hereby given that plaintiffs, Fidelity Union Trust Company, a banking corporation of the State of New Jersey, as Trustee under the General Bond Resolution of the N. J. Highway Authority adopted July 8, 1953, as supplemented, and First National State Bank of New Jersey, a national banking association, as Trustee under the Junior Bond Resolution of the New Jersey Highway Authority adopted July 7, 1962, as supplemented, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, affirming the constitutionality of amendments to the New Jersey Highway Authority Act, N.J. Stat. Ann, §27:12B-4.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

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NO. 80-2051

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

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NO. 80-2051

IN THE

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Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

Motion

The New Jersey Highway Authority (Authority) herewith submits this motion to dismiss the appeal from the judgment of the New Jersey Supreme Court on the ground that the appeal does not present a substantial federal question.

Statement of Case

Appellants-plaintiffs Fidelity Union Trust Company and First National State Bank (Appellants) are trustees under certain bond resolutions of the Authority. Appellants brought a declaratory judgment action in the Superior Court of New Jersey against the Authority and the Attorney General of the State of New Jersey seeking to invalidate an amendment to the New Jersey Highway Authority Act (N.J.S.A. 27:12B-1 et seq. [Act]), which conferred upon the Governor of the State of New Jersey and either the State Treasurer or Comptroller the right, in effect, to veto toll adjustments (L. 1973, c. 370, §1). Appellants alleged that the amendment constituted an unconstitutional impairment of the obligations of contract between the bondholders and the Authority.

The Superior Court of New Jersey held that the amendment impaired the contract rights of the bondholders of the Authority in violation of the Contract Clause of the Constitution of the United States and of the State of New Jersey and accordingly entered judgment in favor of the Appellants. The Authority and the Attorney General appealed. The Supreme Court of New Jersey granted the Attorney General's motion for direct certification. The Supreme Court, in reversing the trial court's decision, held that the amendment did not impair the bondholders'

contract rights so as to violate the Contract Clause of the Constitution of the United States or of the State of New Jersey.

The Supreme Court of New Jersey recited the following operative facts at the outset of its opinion (Appendix A, pp. 3a-7a):

> The Act created a body corporate known as the New Jersey Highway Authority. N.J.S.A. 27:12B-4. Its declared purposes were to construct, operate, maintain and improve "modern express highways embodying every known safety device including center divisions, ample shoulder width, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads. . . ." N.J.S.A. 27:12B-2. The Authority was given specific powers to accomplish these purposes. Included were the power to fix, revise and collect tolls, N.J.S.A. 27:12B-5(i), and the authorization to issue bonds and notes to be secured by a pledge of all or any part of its tolls or revenues, N.J.S.A. 27:12B-9(a)(i). Furthermore, it was authorized to include a covenant with respect to the toll rates "to be established and charged" in a contract with the proposed security holders. N.J.S.A. 27:12B-9(a)(viii). The State pledged to all future holders of the bonds that it would not limit or restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of bonds or notes . . . or in any way impair the rights or remedies of the holders. . . ." N.J.S.A.

27:12B-11. Moreover, the tolls were not to "be subject to supervision or regulation by any other commission, board, bureau or agency of the State." N.J.S.A. 27:12B-14. Some of the bonds to be issued, up to $285,000,000 in aggregate principal amount, were entitled to a state guarantee of payment of interest and principal. L. 1952, c. 17, §1 (current version at N.J.S.A. 27:12B-20).

When first created, the Authority consisted of three members appointed by the Governor with the advice and consent of the Senate. Two members constituted a quorum and the vote of two was necessary for motions or resolutions. L. 1952, c. 16 §4 (current version at N.J.S.A. 27:12B-4). Subsequently, the membership was increased to five, three being necessary for quorum and action. L. 1970, c. 28, §1 (current version at N.J.S.A. 27:12B-4). The Act was amended again to provide for seven members, four being necessary for a quorum and action. N.J.S.A. 27:12B-4 (as amended by L. 1975, c. 5, §1).

The specific highway project which the Authority was directed to undertake was construction of "The Garden State Parkway" from Route 17 in Paramus to Cape May. N.J.S.A. 27:12B-20. The Authority issued and sold bonds of various series to finance the cost of that construction. The road was thereupon built and subsequently extended and enlarged. It has been a successful project. According to the Authority's 1977 Annual Report there were 196,390,000 toll trips in that year. Indeed bond interest and bond service (interest and principal amount due on maturing bonds) were covered 3.496 and 1.317 times, respectively. The standard toll

on the Parkway since its inception more than 25 years ago has been 25 cents.

Plaintiffs, as trustees of several Authority bond issues, sought to invalidate the amendment to the Act effective January 4, 1974, a date subsequent to the issuance of the bonds. See L. 1973, c. 370, §1 (amending N.J.S.A. 27:12B-4). That amendment reads in pertinent part as follows:

(text omitted)

It is this change, the requirement that revision of the tolls by the Authority may not be effective without the prior written approval of the Governor and the state treasurer or comptroller of the treasury, that the trustees contend violates the Contract Clauses of the federal and state constitutions.

The terms and conditions of each bond series of which the Fidelity Union Trust Company is trustee are prescribed in a General Bond Resolution adopted by the Authority on July 8, 1975 and in supplemental resolutions authorizing the particular series.[3] (footnote omitted). First National State Bank is the trustee of Junior Revenue Bonds, issued pursuant to a Junior Bond Resolution and a First Supplemental Junior Bond Resolution adopted on July 7, 1962.[4] (footnote omitted).

The Federal Question is Not Substantial

The Supreme Court of New Jersey properly applied the principles of *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

Appellants allege that the decision of the New Jersey Supreme Court contravenes this Court's decisions in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). It is respectfully submitted that the contention of the Appellants is without merit.

Following a recitation of the operative facts and a brief history of decisions construing the Contract Clause, the New Jersey Supreme Court carefully analyzed the Court's decisions in *United States Trust* and *Allied Structural Steel* (Appendix A at pp. 9a-12a). Based upon that analysis, the New Jersey Supreme Court framed the following issues:

> "(1) What were the terms of a financial agreement between the parties? (2) Was there an impairment of a financial condition of the contract? (3) If so, was it substantial? (4) Since the contract was with the State, did the State have the ability to limit its power to act in the future with respect to the administration of the New Jersey Highway Authority Act?" (Appendix A, p. 12a).

It is respectfully submitted that the New Jersey Supreme Court's analysis of these issues was consistent with the principles set forth in *United States Trust* and *Allied Structural Steel.*

I

The terms in the bond resolutions and the provisions of the Act constitute the contract with the bondholders. Pursuant to N.J.S.A. 27:12B-3(a), the Authority is defined to include "the board, body or commission succeeding to the principal functions therof or to whom the powers given by this act to the Authority shall be given by law." This statutory definition was incorporated in the various bond resolutions.

As noted by the Supreme Court of New Jersey, it was therefore manifest that bond purchasers "knew that the Authority as it existed might not remain the same throughout the life of the bonds. The Authority's composition, size or even existence were not frozen." (Appendix A, pp. 12a-13a). The New Jersey Supreme Court went on to note that "the bondholders could harbor no reasonable expectation that the existence of the Authority or its composition was immutable." (Appendix A, p. 13a). The New Jersey Supreme Court properly concluded that all that occurred was a change in the structure of the governance of the Garden State Parkway, that such a change was within the scope of the terms of the bond resolutions and Act, and that no modification of the bond terms was involved since the obligation to establish and collect tolls to produce sufficient revenues remained unimpaired.

II

As noted by the New Jersey Supreme Court, unlike the amendments involved in *United States Trust* and *Allied Structural Steel*, the instant amendment did not involve a substantial financial condition of the agreement between the parties. The various bond resolutions required that the Authority establish and collect sufficient tolls so that total

net revenue in each year equaled at least 120% of the total debt service for the year (a condition historically satisfied by the Authority). This financial security remained unaffected by the amendment. Indeed, the amendment expressly provides that the Governor and the State Treasurer or Comptroller must exercise their powers "with due regard for the rights of the holders of bonds of the Authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the Authority . . . to carry out and perform in every detail each and every covenant, agreement or contract . . . entered into by or on behalf of the Authority with respect to its bonds or for the benefit, protection or security of the holders thereof." (N.J.S.A. 27:12B-4).

The New Jersey Supreme Court properly concluded that there had been no substantive alteration in terms of the bonds and that at most, there had "been a change in the identity of the individuals charged with assuring that the interest of the bondholders and the public in toll adjustments is safeguarded." (Appendix A, p. 18a). In support of its conclusion, the New Jersey Supreme Court cited numerous cases supporting the proposition that a legislature may substitute officers who administer a project, without contravening the Contract Clause. See e.g., *State ex rel. Warner* v. *Hoagland*, 51 N.J.L. 62 (Sup. Ct. 1888); *Rorick* v. *Board of Commissioners*, 57 F. 2d 1048 (N. D. Fla. 1932), vacated on jurisdictional grounds, 307 U.S. 208 (1939).

III

The New Jersey Supreme Court further concluded that even if the amendment was deemed to be a modification of the contract between the bondholders and the Authority,

that modification was not substantial. It cited the *United States Trust* and *Allied Structural Steel* cases for the proposition that not every impairment is violative of the Contract Clause. The impairment must be a substantial one.

As set forth by the New Jersey Supreme Court, Appellants did not demonstrate any adverse financial impact upon the bonds as a result of the amendment. The only evidence before the trial court on this issue were affidavits submitted by the Authority stating that the amendment had no effect on the market value of the bonds.

IV

Finally, the New Jersey Supreme Court raised serious doubts as to whether the State of New Jersey could have lawfully bargained away its right to modify the structure of the government of the Authority. The New Jersey Supreme Court cited with approval Justice Blackman's statement in *United States Trust* that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." (431 U.S. at 23). One of those powers involves the organization of government. As stated by the New Jersey Supreme Court, "the Contract Clause has never been construed or applied as an obstacle to the exercise of the State's authority to change the structure governing a public entity." (Appendix A, p. 24a). The New Jersey Supreme Court relied upon the case of *Shapleigh* v. *San Angelo*, 167 U.S. 646 (1897), wherein the Court stated:

> "The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them all together, is not restricted by contracts entered into by the municipality with its creditors or with private parties." (167 U.S. at 654).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should dismiss the appeal from the judgment of the New Jersey Supreme Court.

Respectfully submitted,

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Dated: June 26, 1981

NO. 80-2051

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

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Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE JAMES R. ZAZZALI, ATTORNEY GENERAL OF NEW JERSEY, TO DISMISS OR TO AFFIRM

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Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE JAMES R. ZAZZALI, ATTORNEY GENERAL OF NEW JERSEY, TO DISMISS OR TO AFFIRM

Appellee James R. Zazzali, the Attorney General of New Jersey, respectfully moves pursuant to Rule 16(1)(b) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey on the ground that it does not present a substantial federal question and pursuant to Rule 16(1)(d) on the grounds that the case does not raise any issues of special importance, does not conflict with federal precedent and is so obviously correct as to warrant no further review by this Court.

Counter-Statement of the Case

In 1952, the Legislature recognized the pressing need of ensuring continued highway expansion and safety through the modernization and maintenance of state roadways, and, as a result, promulgated the New Jersey Highway Authority Act ("Act"). The Act established the New Jersey Highway Authority ("Authority"), or if "said authority shall be abolished, an authority defined as the board, body or commission succeeding to the principal functions thereof or to whom the powers given by the Act to the Authority shall be given by law." N.J.S.A. 27:12B-3(a). The Authority was entrusted with the crucial duty of constructing and operating roadways that presently serve as the vital link between various parts of the State. N.J.S.A. 27:12B-2. As expressed by the Legislature, "the exercise by the Authority of the powers conferred by the Act in the construction, operation, and maintenance of projects shall be deemed and held to be an essential governmental function of the State." N.J.S.A. 27:12B-4.

As a means of financing individual projects, the Act allowed the Authority to fix, revise and collect tolls, N.J.S.A. 27:12B-5(i), and to issue bonds or notes to be secured by a pledge of all or any part of its tolls or revenues, N.J.S.A. 27:12B-9(a)(i). It was also authorized to include a cove-

nant with respect to the toll rates "to be established and charged" in a contract with the proposed security holders. N.J.S.A. 27:12B-9(a)(viii).

To encourage public investment, the Act guaranteed adequate investment return, with interest computed at a fixed periodic rate. The Act allayed investor concern with State interference and possible reallocation of revenues for purposes other than fulfilling State obligations to bondholders, by pledging that the State would not restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of bonds or notes authorized by this act or in any way impair the rights or remedies of the holders . . ." N.J.S.A. 27:12B-11. The goal of securing bondholder investment was further enhanced by the Act. The tolls and charges were to be fixed so "as to effectuate the purposes of [the] act and in any event to carry out and perform the terms and provisions of any contract with or for the benefit of holders of bonds or notes. Such tolls and charges [were not to] be subject to supervision or regulation by any other commission, board, bureau or agency of the State. . . ." N.J.S.A. 27:12B-14.

In 1974, the Legislature amended the Act. It is this amendment that is the subject of this appeal. The amendment did not alter the security provisions outlined above. The bondholders' financial guarantees from the State remained intact. The amendment simply provided that:

> No resolution or other action of the authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway proj-

ects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: The State Treasurer and the Comptroller of the Treasury. The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and *nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.*

A true copy of the minutes of every meeting of the authority shall be forthwith delivered by and under the certification of the secretary thereof, to the Governor. No action taken at such meeting by the authority shall have force or effect until 10 days (Saturdays, Sundays and holidays excepted) after such copy of the minutes shall have been delivered or the approval thereof by the Governor prior thereto. If, in said 10 day period, the Governor returns such copy of the minutes with veto of any action, except action to negotiate or execute a collective negotiation agreement with a certified public employee organization representing employees of the authority, taken by the authority or any member thereof at such meeting, such action shall be null and of no effect. (emphasis added). New Jersey Laws 1973, c. 370, amending N.J.S.A. 27:12B-4.

Though the amendment expressly directs the Governor to exercise his duties thereunder in complete accordance with the guaranteed financial security of the bondholders, the appellants instituted a declaratory judgment action claiming, pertinent hereto, that the amendment was an unconstitutional violation of the Contract Clause. The New Jersey Superior Court, Chancery Division, granted summary judgment to plaintiffs, 164 N.J. Super. 246 (Ch. Div. 1978) (Aa26 to 72).*

On appellees' motion, the New Jersey Supreme Court granted direct certification. 82 N.J. 282 (1979). After reviewing the statutory amendment and discovering no impairment of the Act's security provisions sufficiently adequate, in light of recent decisions of this Court, to justify declaring the amendment unconstitutional, the court reversed the Chancery Division and held that the amendment did not violate either the United States or New Jersey Constitution. 85 N.J. 277, —— A.2d —— (1981) (Aa1 to 25). In particular, the court initially identified the terms of the agreement between the Authority and the bondholders as constituted by bond resolutions and the Act and found that the bond purchasers knew the Authority's composition, size or even existence was never a term of their agreement with the Authority (Aa12-13). In fact, appellants so conceded at oral argument before the Supreme Court of New Jersey (Aa14). The challenged amendment was found to consist of nothing more than a change in the structure of the governance of the Authority and, thus, did not involve a financial condition of the agreement. As the court noted, none of the requirements for the financial security of the bondholders was diminished by the 1973

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* As used herein Aa refers to the appendix filed by appellants with their Jurisdictional Statement.

amendment; in fact, precisely the same obligation to protect the bondholders' rights was imposed upon the Governor and the State Treasurer or Comptroller as had originally been imposed upon the Authority members. N.J.S.A. 27: 12B-4 (Aa17 to 18).

Next the court determined that even if the amendment could be considered to modify the financial terms of the bondholders' agreement, the modification was at most insubstantial (Aa21).* Appellants demonstrated no adverse impact arising from the 1973 amendment, with the only affidavits in the record reflecting no effect upon the market value of the bonds (Aa21). In this respect, the court found the 10 days afforded the Governor to approve or disapprove the Authority's action inconsequential (Aa22). Further, the court concluded that the State could and did properly exercise its authority to change the structure governing a public entity (Aa23-24). Thus, since the financial terms of the agreement between the bondholders and the Authority were not impaired by the agreement and even if there had been some impairment it was insubstantial and since, in any event the amendment was a proper exercise of State power, the lower court's decision was reversed and the constitutional assertions of appellants rejected.

On April 30, 1981, appellants filed a Notice of Appeal with this Court pursuant to 28 U.S.C. §1257(2). Thereafter they filed a Jurisdictional Statement and this motion followed.

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* Page 26 of the court's slip opinion which contains the phrase "it is at most insubstantial" is incorrectly reproduced in appellants' appendix at page 21a as "it is at most substantial."

ARGUMENT

The appeal should be dismissed or the State Supreme Court judgment affirmed because appellants fail to raise a substantial federal issue, the case presents no issue of broad importance or conflict with federal precedent and the determination that the State legislative action did not unconstitutionally impair the contractual rights of the bondholders was plainly correct.

This case does not present a substantial federal constitutional issue. The State Supreme Court decision fully follows the standards governing a Contract Clause challenge as recently rearticulated by this Court. The decision, moreover, grounded in the peculiar facts pertinent hereto raises no issues of broad importance, neither does it conflict with any federal precedent. Finally, the rejection of appellants' constitutional challenge was plainly correct.

With limited exception, the enactment of State legislation that totally eliminates an important security provision, substantially impairs the contractual relationship or severely disrupts contractual expectations, violates the Contract Clause. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co.* v. *Spannus*, 438 U.S. 234 (1978). As noted, however, by the Supreme Court of New Jersey, states retain their broad police powers which may affect contracts so long as the exercise thereof serves a legitimate public purpose and the adjustment of contractual duties and obligations is reasonable. *Id.* 241; *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 22-24. Thus, in considering whether there has been a violation of the Contract Clause the terms of the financial agreement between the parties must be ascer-

tained and it must be determined whether there was an impairment thereof and, if so, to what extent. It must further be determined whether the impairment, if any, was the result of proper exercise of state power. It is plain that evaluating the particular facts of this case in light of these criteria the Supreme Court of New Jersey properly found that the 1973 amendment complained of by appellants did not violate the Contract Clause.

As initially noted by the court, the terms of the agreement between the bondholders and the Authority provided no vested rights in the particular form of the Authority. What the bondholders obtained from the State was a promise to pay interest or principal when due and a promise to maintain adequate security or remedies to insure the timely performance of the primary obligation. The 1973 amendment affected no change or threat to this right of financial security. The only effect of chapter 370 was to take certain powers previously possessed solely by the Authority and to bestow those powers jointly upon the Authority, the Governor and Treasury officials. Chapter 370 makes it unmistakably clear that the Governor and Treasury officials are subject to precisely the same obligations as are members of the Authority with respect to protection of the rights of the Authority's bondholders. It is of course theoretically possible that an improperly motivated Governor or Treasury official could veto decisions of the Authority which were necessary to safeguard the financial interests of bondholders. It is equally possible, however, that the powers under chapter 370 of the Governor or Treasury official could be employed to thwart a proposed course of action which would be inimical to the bondholders. In any event, the controlling circumstance is that bondholders retain the same remedies under chapter 370 as heretofore for enforcement of their rights under outstanding bonds.

Even assuming *arguendo* that a change in allocation of responsibility for governing a public entity could be deemed to impair contractual relations, the Supreme Court of New Jersey plainly correctly found that appellants failed to demonstrate any adverse impact upon the security of the Highway Authority bonds. The 1973 amendment to N.J.S.A. 27:12B-4 declares that the Governor and either the State Treasurer or the Comptroller of the Treasury must approve all toll adjustments by or bond resolutions of the Highway Authority prior to those acts becoming effective. The Legislature, however, was assiduous in taking care that such power be conferred with clearly ascertainable standards for its exercise. The amendment states:

> "No resolution or other action by the authority providing for the issuance of bonds, refunding bonds or other obligations or for the fixing, revising or adjusting of tolls for the use of any highway projects or parts or sections thereof shall be adopted or otherwise made effective by the authority without the prior approval in writing of the Governor and at least one of the following: The State Treasurer and the Comptroller of the Treasury. *The powers conferred in this section upon the Governor, the State Treasurer and the Comptroller of the Treasury shall be exercised with due regard for the rights of the holders of bonds of the authority at any time outstanding, and nothing in, or done pursuant to this section shall in any way limit, restrict or alter the obligation or powers of the authority or any representative or officer of the authority to carry out and perform in every detail each and every covenant, agreement or contract at any time made or entered into by or on behalf of the authority with respect to its bonds or for the benefit, protection or security of the holders thereof.*" (emphasis added). N.J.S.A. 27:12B-4.

Accordingly, the Governor has been instructed to consider the rights of any Parkway bondholders arising from their covenants or agreement with the Authority, before consenting to or rejecting any change in the toll structure or the amount of bonded indebtedness.

A Parkway bondholder is entitled to prompt payment of interest on his investment and the return on his principal. The principal guarantee for the dutiful performance of these obligations is defined, treated and implemented in the General Bond Resolution, the Junior Bond Resolution and the supplemental bond resolutions. In an express covenant, the Highway Authority has promised the bondholders that a toll and other charges will be imposed to insure income well in excess of the annual operational items (i.e., expenses, reserves, working capital) and debt service (i.e., interest and principal). Specifically, Section 711 of the various bond resolutions mandates the collection of tolls and charges so as to produce annual net income equal to at least the annual aggregate amount of interest and principal due and payable to bondholders.

Chapter 370 of the Laws of 1973 maintains these safeguards by explicitly protecting any right to a specific level of toll income which accrued to the Parkway bondholders by reason of their covenant, agreement or contract with the Highway Authority. The self-executing clause of the amendment to N.J.S.A. 27:12B-4 prevents any diminution or curtailment of the obligation to establish a toll rate in conformity with Section 711. Therefore, the amendment amounts to an equivalent security provision which impinges upon no substantial right of the bondholders. This conclusion is firmly supported by the fact that the only evidence presented below on the subject of value of Parkway bonds before and after adoption of the amendment indicated a stable market in those securities.

Appellants' bald assertion, therefore, that the decision of the Supreme Court of New Jersey in this case is in direct contravention with this Court's decisions in *United States Trust Co.* and *Allied Structural Steel Co.* is misplaced. Further, the assertion that the 1973 amendment infringes upon security provisions of the Act which are an integral part of the terms of the agreement between the bondholders and the Authority is drawn from whole cloth. The financial terms of the agreement are not affected at all, much less significantly so. The amendment, moreover, represents a valid exercise of State authority over governmental organization. Plainly this case does not present a substantial federal question. It does not present an issue of broad importance or a conflict with federal precedent and, finally, the judgment below is clearly correct. Accordingly, the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

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